

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 61

JOHN H. CRUMADY, PETITIONER,

vs.

**"JOACHIM HENDRIK FISSER", HER ENGINES,
TACKLE, APPAREL, ETC., JOACHIM HENDRIK
FISSER, ET AL.**

No. 62

**"JOACHIM HENDRIK FISSER", HER ENGINES,
TACKLE, APPAREL, ETC., PETITIONER,**

vs.

NACIREMA OPERATING CO., INC.

**ON WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

NO. 61, PETITION FOR CERTIORARI FILED APRIL 30, 1958

NO. 62, PETITION FOR CERTIORARI FILED MAY 1, 1958

CERTIORARI GRANTED JUNE 9, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 61

JOHN H. CRUMADY, PETITIONER,

vs.

"JOACHIM HENDRIK FISSER", HER ENGINES,
TACKLE, APPAREL, ETC., JOACHIM HENDRIK
FISSER, ET AL.

No. 62

"JOACHIM HENDRIK FISSER", HER ENGINES,
TACKLE, APPAREL, ETC., PETITIONER,

vs.

NACIREMA OPERATING CO., INC.

ON WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

INDEX

	Original	Print
Record from U.S.D.C. for the District of New Jersey		
Appellant's appendix	1	1
Relevant docket entries	1	1
Libel of information	7	7
Answer of Hendrik Fisser Aktien Gesellschaft	12	10
Opinion, Wortendyke, J.	16	14
Decree for judgment	42	40
Claimant's appendix	44	41

	Original	Print
Claimant's appendix—Continued		
Transcript of testimony (excerpts) _____	44	41
Testimony of Charles Irving Hubert—		
direct _____	44	41
Hermann Buss—		
direct _____	45	42
cross _____	47	44
Robert Allen Simons—		
direct _____	48	45
cross _____	49	46
Walter J. Byrne—		
direct _____	51	47
cross _____	51	48
John G. Foley—		
direct _____	53	49
Appendix on behalf of the respondent-impleaded appellant, No. 12,140 and appellee in Nos. 12,138, 12,139 _____	57	52
Transcript of testimony (excerpts) _____	57	52
Testimony of Manuel Costa—		
direct _____	57	52
cross _____	66	60
Appellee's appendix in No. 12,139 _____	68	62
Transcript of testimony (excerpts) _____	68	62
Testimony of Dr. Herman Lohman—		
direct _____	68	62
Captain Peter Peters—		
direct _____	70	64
Robert Allen Simons—		
direct _____	71	65
cross _____	74	68
Walter J. Byrne—		
cross _____	75	67
Libellant's supplemental appendix _____	76	68
Transcript of testimony (excerpts) _____	76	68
Testimony of Hermann Buss—		
direct _____	76	68
Isaac Stewart—		
cross _____	81	72
Manuel Costa—		
direct _____	84	75

Libellant's supplemental appendix—Continued		
Transcript of testimony (excerpts)—Continued	Original	Print
Testimony of Robert Allen Simons—		
direct _____	86	77
Walter J. Byrne—		
direct _____	92	82
cross _____	97	86
Claimant's supplemental appendix in No. 12,138, 12,139, and 12,140 _____	101	90
Transcript of testimony (excerpts) _____	101	90
Testimony of Peter Peters—		
cross _____	101	90
Robert A. Simons—		
direct _____	102	91
cross _____	105	94
Walter J. Byrne—		
cross _____	105	94
John Joseph Smith _____	107	96
Stevedore contract referred to by Trial Court _____	108	96
Supplemental appendix of the respondent- impleaded appellant, No. 12,140 and appellee in Nos. 12,138 and 12,139 _____	116	104
Transcript of testimony (excerpts) _____	116	104
Colloquy _____	116	104
Proceedings in the U.S.C.A. for the Third Circuit	121	109
Opinion, Hastie, J. _____	121	109
Judgment _____	127	115
Libellant's petition for rehearing _____	128	115
Table of contents—see page 116 _____	129	116
Table of cases cited—see page 116 _____	130	116
Opinion on rehearing, per curiam _____	149	129
Dissenting opinion on rehearing, Biggs, J. _____	150	130
Order denying petition for rehearing _____	152	131
Clerk's certificate (omitted in printing) _____	153	131
Orders extending time to file petition for writ of certiorari _____	154	132
Orders allowing certiorari _____	156	133



**APPELLANT'S APPENDIX—FILED
FEBRUARY 28, 1957**

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

JOHN H. CRUMADY, Appellant,

v.

**JOACHIM HENDRIK FISSEr, Her Engines, Tackle, Apparel,
etc., and JOACHIM HENDRIK FISSEr and/or HENDRIK
FISSEr, Respondent.**

NACIREMA OPERATING Co., INC., Impleaded Respondent.

RELEVANT DOCKET ENTRIES

- 1- 4-54 Libel and complaint filed.
- 1- 4-54 \$250.00 deposited in Registry.
- 1- 4-54 Clerk's Certificate redeposit in registry filed.
- 1- 4-54 Monition issued returnable 2-8-54.
- 1- 4-54 Notice of Allocation filed (Newark).
- 1- 6-54 Value Bond filed 1-5-54.
- 1- 6-54 Clerk's Order of Release of Vessel filed 1-5-54.
- 1- 6-54 Claim of Owner filed 1-5-54.
- 1- 7-54 Monition returned executed filed 1-6-54.
- 1- 7-54 Copy of order of release with Marshal's return thereon filed 1-6-54.
- 2- 8-54 Answer of Hendrik Fisser Aktien Gesellschaft, claimant filed 2-5-54.
- 2- 8-54 Stipulation for unpleaded petitioner's costs filed 2-5-54.

- 2- 8-54 Petition to implead Nacerema Operating Co., Inc.,
filed 2-5-54.
- 2- 8-54 Citation to impleaded respondent issued.
- 2-16-54 Citation to impleaded respondent returned, executed, filed 2-15-54.
- 3-12-54 Stipulation extending time of impleaded respondent to answer to 3-15-54 filed.
- 3-16-54 Answer of Nacerema Operating Co. filed.
- 3-16-54 Stipulation for costs of impleaded respondent filed.
- [fol. 2]
- 7-13-54 Order of re-assignment, filed (Forman) Notice mailed.
- 9-26-55 Pre-Trial Conference. Ordered leave granted to respondent—impleaded to amend answer. (Wortendyke) 9-22-55.
- 9-28-55 Transcript of Pre-trial Conference, filed.
- 9-30-55 Deposition of Libellant filed 9-29-55.
- 10-28-55 Ordered trial adjourned preemptorily (sic) to Feb. 23, 1956.
Order to be submitted (Wortendyke) (10-27-55)
- 11- 4-55 Order fixing trial date preemptorily for Feb. 23, 1956 filed 11-3-55 (Wortendyke) Notice mailed.
- 1-19-56 Respondent-Impleaded's Interrogatories filed.
- 1-26-56 Order to show cause re: Interrogatories, filed 1-25-56 (Wortendyke) (ret. 1-30-56).
- 1-31-56 Notice of motion by claimant to require libellant and respondent-impleaded to produce and permit the inspection and testing of certain articles, and acknowledgment of service, filed (ret. 2-14-56) (no brief submitted).
- 2- 1-56 Hearing on motion to take depositions abroad. Decision reserved. (Wortendyke) (1-31-56)

2- 3-56 Letter-opinion granting motion re interrogatories (sic) to be answered abroad filed 2-1-56.

2- 8-56 Consent order for Commission to take testimony filed 2-7-56 (Wortendyke) Notice mailed.

2-10-56 Notice of motion by respondent-impleaded to strike the impleaded petition of the respondent for failure to answer interrogatories; and for the inspection, etc. of the log and affidavit of service, filed (ret. 2-14-56) (No brief submitted).

[fol. 3]

2-15-56 Claimant's motion to require libellant and respondent-impleaded to produce and permit the inspection and testing of certain articles withdrawn (Wortendyke) (2-14-56).

2-15-56 Proclamation made of respondent-impleaded's motion to strike impleading petition of respondent for inspection, etc., of log. Consent order submitted (Wortendyke) (2-14-56).

2-15-56 Consent Order directing respondent to answer interrogatories; to permit respondent-impleaded to examine and copy certain portions of log filed 2-14-56 (Wortendyke).

2-28-56 Depositors of Karl Heinrichsdorff and August Otto before Vice Consul at Bremen, Germany, filed 2-25-56.

2-29-56 Order directing Clerk to deliver depositions taken in Germany to Counsel for claimant or impleaded-respondent, etc., filed 2-28-56 (Wortendyke).

3- 5-56 Trial without Jury before Hon. Regnier J. Wortendyke, Jr. (3-1-56). Trial adjourned to 3-2-56.

3- 5-56 Claimant's answers to interrogatories, filed 3-2-56.

3- 5-56 Trial continued (3-2-56).
Trial adjourned to 3-5-56.

3- 6-56 Trial continued (3-5-56).
Trial adjourned to 3-6-56.

3- 7-56 Trial continued (3-6-56).
Trial adjourned to 3-7-56.

3- 8-56 Trial continued (3-7-56).
Trial adjourned to 3-9-56.

3-12-56 Trial continued (3-9-56).
Trial adjourned to 3-13-56.

[fol. 4]

3-14-56 Trial continued (3-13-56).
Trial adjourned to 3-14-56.

3-15-56 Trial continued (3-14-56).
Trial adjourned to 3-15-56.

3-16-56 Trial continued (3-15-56).
Trial adjourned to 3-16-56.

3-20-56 Trial continued (3-16-56).
Trial adjourned to 3-26-56.

3-27-56 Trial continued (3-26-56).
Trial adjourned to 3-29-56.

4- 2-56 Trial continued (3-29-56).
Trial adjourned to 4-5-56.

4-10-56 Trial continued (4-6-56).
Trial adjourned to 4-10-56.

4-11-56 Trial continued (4-10-56).
Hearing on motion to dismiss as to impleaded
respondent. Decision Reserved.
Trial adjourned to 4-11-56.

4-12-56 Trial continued (4-11-56).
Trial adjourned to 4-12-56.

4-13-56 Trial continued (4-12-56).
Trial adjourned to 4-13-56.

5-18-56 Ordered April 12, 1956 minutes amended as fol-
lows: Decision Reserved. Findings of Facts
and conclusions of law to be submitted.

- 6- 6-56 Deposition of John Joseph Smith filed 6-5-56.
- 6-27-56 Opinion filed (Wortendyke) (In favor of Libellant).
- 8- 3-56 Notice for settlement of Decree with affidavit of service filed (ret. 8-8-56).
- 8- 9-56 Hearing on notice for settlement of decree.
Order to be submitted (Wortendyke) (8-8-56).
- [fol. 5]
- 8-17-56 Hearing on respondent's application for allowance of counsel fees. Ordered application denied (Wortendyke) (8-15-56).
- 8-17-56 Ordered stenographer's costs be taxed by Clerk (Wortendyke) (8-15-56).
- 8-17-56 Decree for judgment for \$55,527.15 with costs (including \$614.41 paid by libellant to court reporter), in favor of John H. Crumady, libellant, and against respondent, Joachim Hendrik Fisser, her engines, tackle, apparel, etc., and claimant, Hendrik Fisser Aktien Gesellschaft; and judgment for \$55,527.15 and such interest as is paid thereon and libellant's taxed costs, with costs (including \$614.41 paid by claimant to court reporter) in favor of Hendrik Fisser Aktien Gesellschaft, claimant, and against Nacerema Operating Co., Inc., respondent-impleaded filed 8-15-56 (Wortendyke).
- 8-24-56 Verified Bill of Costs and Notice to tax returnable 8-29-56 and affidavit of service filed.
- 8-29-56 Notice of taxation of costs and libellant's bill of costs filed 8-28-56 (ret. 8-29-56).
- 8-30-56 Hearing on application to modify final decree as to allowances for costs of trial transcript. Ordered application denied (Wortendyke) (8-29-56).
- 8-30-56 Claimant's Taxation of Costs in the sum of \$2240.96 filed.

- 8-30-56 Libellant's Taxation of Costs in the sum of \$903.52 filed.
- 10- 5-56 Transcript of Trial filed 10-4-56 (4 volumes).
- 11-15-56 Notice of Appeal filed 11-13-56.
- 11-15-56 Appeal bond filed 11-13-56.
- 11-15-56 Notice of Cross-Appeal by Claimant filed 11-13-56 [fol. 6]
- 11-15-56 Copies of notice of appeal mailed to Brass & Brass, Esqs., Charles N. Fiddler, Esq., and Clerk, U. S. C. A.
- 11-15-56 Copies of notice of cross-appeal mailed to Brass & Brass, Esqs., Stryker, Tams & Horner, Esqs., and Clerk, U. S. C. A.
- 11-16-56 Notice of cross appeal by libellant filed.
- 11-16-56 Copies mailed to Charles N. Fiddler, Esq., Stryker, Tams & Horner, Esqs. and Clerk, U. S. C. A.
- 11-23-56 Consent order for release of certain exhibits temporarily filed 11-20-56 (Wortendyke).
- 12- 3-56 Petition and order extending time of libellant for for (sic) filing. Notice of Appeal, filed. (Wortendyke) Notice mailed.
- 12- 3-56 Order extending time to file record on appeal and to docket action filed. (Wortendyke) Notice mailed. Copies mailed U.S.C.A.
- 12- 6-56 Notice of Appeal filed.
- 12- 6-56 Copies of notice of appeal sent to Charles N. Fiddler, Esq., Stryker, Tams & Horner, Esqs., and U.S.C.A.
- 12-11-56 Order extending time to transmit record on appeal to 1-8-57 and to docket action to 1-18-57 filed. (Wortendyke) (Copy mailed to U.S.C.A.)
- 12-14-56 Partial transcript of trial filed 12-13-56.
- 1- 7-57 Record on Appeal sent to U.S.C.A.

IN UNITED STATES DISTRICT COURT

LIBEL OF INFORMATION—Filed January 4, 1954

The libel of the complaint of John H. Crumady, residing at number 146 South 9th Street, in the City of Newark, County of Essex and State of New Jersey, a citizen of the United States of America, in a cause of action for damages, civil and maritime, for injuries sustained against the ship, "JOACHIM HENDRIK FISSE", her engines, tackle, apparel, etc. and against Joachim Hendrik Fisser and/or Hendrik Fisser, claimants and respondents and against all of the persons intervening in their interests therein in a cause of action for damages, civil and maritime, alleges as follows:

First: That on or about the 2nd day of January, 1954, Joachim Hendrik Fisser and/or Hendrik Fisser was the registered owner of the aforesaid ship known then as "JOAKIN HENDRIK FISSE", and said owner or owners are owners and residents of Emden, Germany.

Second: Your libellant, not being certain as to who is actually the owner of said ship, therefore sues Joachim Hendrik Fisser and Hendrik Fisser, jointly and severally, and leaves it to this court to determine who is actually liable for any and all damages sustained by this libellant by reason of the injuries caused to him by the negligence hereinafter complained of.

Third: That on January 2, 1954, the claimants and respondents held out an invitation to this libellant to board the said ship and to work thereon for the purpose of assisting other longshoremen, likewise invited and engaged, in the removal of a cargo of lumber therefrom while said ship was lying in navigable waters known as Newark Bay, adjacent to the State of New Jersey, in the United States of America, and said ship was moored to the pier on the south side of Port Newark, County of Essex and State of New Jersey.

[fol. 8] Fourth: On the 2nd day of January 1953, the libellant was in the employ of Turner & Blanchard, Inc. and/or Nacirema Stevedoring Co., both corporations being engaged in the stevedoring business and engaged on said date in the transferring of a cargo of lumber from said ship to the pier at which it was moored with the knowledge and consent of claimants and respondents, for their benefit, gain or profit and for the purposes for which said ship was at said pier.

Fifth: On said date, the libellant was lawfully in the forward hold on deck of said ship, duly engaged in his employment in and about the loading and transfer of the cargo, and was not a member of the crew of said ship, but was an invitee thereon, having accepted the invitation of the claimants and respondents to board the said ship and to work as aforesaid thereon which invitation was extended to libellant by the claimants and respondents through their duly authorized agents, servants or employees.

Sixth: On said 2nd day of January, 1954, while libellant was employed as aforesaid, the claimants and respondents and/or by their agents, servants or employees, negligently, carelessly and recklessly caused, allowed and permitted a boom to drop and fall upon and against the libellant severely and permanently injuring him as herein-after set forth.

Seventh: The said accident and the said injuries were caused without any fault or negligence on the part of the libellant, but solely through the fault, carelessness and negligence of the claimants and respondents, jointly or severally, and their agents, servants or employees.

Eighth: The said claimants and respondents were negligent, careless and reckless in that they failed to provide sufficient and proper equipment and machinery; in that said machinery and equipment were defective, out of repair, inadequate, insufficient and unsuited for the purpose [fol. 9] of handling the cargo; in that the cable and wiring forming a part of the said equipment were worn, frayed and damaged, and were used with the knowledge of that fact; in that the claimants and respondents failed and

neglected to inform or notify libellant of the hazardous and dangerous condition of the said equipment and of the hazardous and dangerous condition of the employment on the said ship at the time of the accident; in that the claimants and respondents allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said ship; in that said claimants and respondents themselves or through their agents, servants or employees gave libellant no warning of any kind so as to permit him an opportunity to get out of the way of said broken and defective boom and equipment; that the equipment attached to said boom and a part thereof was insufficient, defective, inadequate and unsuited to handle the transfer of said cargo; and said claimants and respondents were in devious other ways negligent, careless and reckless.

Ninth: As the result of all of which as aforesaid, libellant sustained compound comminuted fractures of his left tibia and fibula, multiple comminuted (sic) fractures of his pelvic bone, multiple fractures of the transverse processes of his spine, separation of the symphysis pubis, severe shock, injury to internal organs, still undetermined and injury to other portions of his body, all of which have caused and will in the future cause extreme pain and suffering and will result in permanent injury, and libellant will be compelled to undergo treatment and surgical operations.

Tenth: By reason of the injuries caused as aforesaid, libellant will be compelled to expend large sums of money for hospital confinement, physicians services, nurses, medicines, X-rays, and other medical care and attention, and he will be incapacitated from following his usual occupation and performing his usual duties thereby suffering the loss [fol. 10] of wages and earnings and resulting in great monetary damage.

Eleventh: That at all times herein mentioned Joachim Hendrik Fisser and Hendrik Fisser or either of them operated said ship, "Joachim Hendrik Fisser" through their agents, servants or employees.

Twelfth: That the said Joachim Hendrik Fisser is a merchant vessel and is now or will be during the issuance of process within the territorial jurisdiction of the United States and of this Court.

Thirteenth: That all and singular, the premises of the foregoing libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the ship, Joachim Hendrik Fisser, her tackle, engines, apparel, etc., and that all persons claiming any right, title or interest therein may be cited to appear and answer, all and singular, the matters aforesaid, and that this Honorable Court may be pleased to decree payment by the claimants or either of them to the libellant, aforesaid, in the sum of \$200,000.00 with interest and costs or in any amount that may be just and proper and that the said ship may be condemned and sold to pay the same and that libellant may have such other further relief and redress as in law and justice he may be entitled to receive and the Court is competent to give in the premises.

Brass & Brass, Proctors for Libellant, By Sidney A. Brass, a member of the firm.

[fol. 11] *Duly sworn to by John H. Crumady, jurat omitted in printing.*

[fol. 12]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 5, 1954

The claimant, Hendrik Fisser Aktien Gesellschaft, answering the libel by its proctor, Charles N. Fiddler, alleges upon information and belief as follows:

First: It admits that on or about January 2, 1954, it was the owner of the S.S. Joachim Hendrik Fisser and was

a resident of Emden, Germany. It denies all the other matters contained in Article numbered First of the libel.

Second: It denies that it has any knowledge or information thereof sufficient to form a belief as to all the matters contained in Article numbered Second of the libel.

Third: It admits that prior to January 2, 1954, it entered into a contract with Nacirema Operating Co., Inc., under which it engaged Nacirema Operating Co., Inc., to discharge a cargo of lumber from the S.S. Joachim Hendrik Fisser, and that upon information and belief, on January 2, 1954, the libellant, together with other longshoremen, as agents, servants and/or employees of Nacirema Operating Co., Inc., came aboard the S.S. Joachim Hendrik Fisser pursuant to the terms of this contract to discharge a cargo of lumber from this vessel, which at the time was lying in navigable waters known as Newark Bay, adjacent to the State of New Jersey in the United States of America, and was moored to the pier on the south side of Port Newark, County of Essex, and State of New Jersey. It denies all the other matters contained in Article numbered Third of the libel.

Fourth: It admits upon information and belief that on January 2, 1954, the libellant was in the employ of Nacirema Operating Co., Inc., a corporation engaged in the stevedoring business, which on said date, pursuant to the terms of the contract aforementioned, was engaged in transferring a cargo of lumber from the S.S. Joachim Hendrik Fisser to [fol. 13] the pier at which it was moored. It denies that it has any knowledge or information thereof sufficient to form a belief as to all the other matters contained in Article numbered Fourth of the libel.

Fifth: It admits upon information and belief that on January 2, 1954, libellant was in the forward hatch of said vessel and was not a member of the crew of said ship, but was an agent, servant or employee of Nacirema Operating Co., Inc., which had been engaged, pursuant to contract, to discharge a cargo of lumber from the S.S. Joachim Hendrik Fisser. It denies that it has any knowledge or infor-

mation thereof sufficient to form a belief as to all the other matters contained in Article numbered Fifth of the libel.

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies all the matters contained in Article numbered Seventh of the libel.

Eighth: It denies all the matters contained in Article numbered Eighth of the libel.

Ninth: It denies all the matters contained in Article numbered Ninth of the libel.

Tenth: It denies all the matters contained in Article numbered Tenth of the libel.

Eleventh: It admits that at the times mentioned in the libel, it operated the S.S. Joachim Hendrik Fisser, but not those parts thereof and the machinery, appliances and equipment thereon which were being operated by, and were under the control of, the libellant, his fellow employees, superiors, and Nacirema Operating Co., Inc., its agents, servants and/or employees. It denies all the other matters contained in Article number Eleventh of the libel.

Twelfth: It admits that the S.S. Joachim Hendrik Fisser is a merchant vessel and that at the time of the filing of the [fol. 14] libel herein, it was within the territorial jurisdiction of the United States and of this Honorable Court.

Thirteenth: It denies that it has any knowledge or information thereof sufficient to form a belief as to whether all and singular the premises of the libel are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. It denies all the other matters contained in Article numbered Thirteenth of the libel.

As a First, Separate and Complete Defense

Fourteenth: That if the libellant received any injuries as alleged in the libel, said injuries were caused in whole or in part by libellant's own negligence, and were not caused or contributed to in any manner by any negligence of the claimant.

As a Second, Separate and Complete Defense

Fifteenth: That the injuries to the libellant, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well-known to the libellant at and before the said injury, and all of said risks, dangers and hazards had been assumed by the libellant.

Wherefore, claimant demands that the libel be dismissed with costs to the claimant as against the libellant, and for such other, further and different relief as the justice of the cause may require.

Charles N. Fiddler, Proctor for Claimant, 2 Edge-wood Place, Maplewood, New Jersey.

[fol. 15] STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

CHARLES N. FIDDLER, being duly sworn, deposes and says:

I am an attorney at law, proctor for Hendrik Fisser Aktien Gesellschaft, claimant herein. I have read and know the contents of said answer, and the same are true to the best of my knowledge, information and belief.

The reason why this verification is made by me and not by said claimant is that said claimant is a foreign corporation, whose officers are not within the county where your deponent has his office.

The sources of my information and the grounds for my belief are statements and information supplied by agents of said claimant.

Charles N. Fiddler

Sworn to before me this 4th day of February, 1954.

(Seal)

Theodore P. Daly, Notary Public, State of New York,
No. 24-0850750, Qualified in Kings County, Certifi-
cates filed with Kings and N. Y. County Clerks
and Registers Offices, Term Expires March 30,
1955.

[fol. 16]

IN UNITED STATES DISTRICT COURT

OPINION—Filed June 27, 1956

Wortendyke, J.:

This admiralty suit was instituted by libel in rem for damages, civil and maritime, for bodily injuries and their consequences, resulting from the fall of a cargo boom serving hatch No. 1 on the motor vessel Joachim Hendrik Fisser, of German registry, while lying in navigable waters of the United States, within the jurisdiction of this Court, at a pier or bulkhead at Port Newark, New Jersey, on January 2, 1954.

The vessel impleaded as a respondent libellant's employer, Nacirema Operating Co., Inc. (herein called Nacirema), the stevedore contractor which was discharging the vessel's cargo at the time of the occurrence complained of.

The injuries were inflicted during the course of discharge of a cargo of lumber and timbers from the forward (No. 1) hatch of the vessel by libellant's fellow-employees. The discharging operations had commenced about an hour before the offending occurrence, during which time certain drafts of lumber had been discharged by means of the so-called "up-and-down" boom and Burton boom from the hatch of the vessel to the pier. The booms and tackle had been initially rigged by the ship's crew but before the operation in the course of which libellant was injured the stevedores had altered the position of the head of the up-and-down boom and the places of fastening of its guy and preventer. The discharging instrumentalities, including the winches, were being handled by libellant and his fellow-employees.

When the accident occurred the stevedores were in the course of discharging from the hatch two timbers, lying fore and aft of the hatch, estimated in dimensions at from [fol. 17] 8" ~~8"~~ to 12" \times 12" in girth and from 30 to 37 feet in length. One of these two timbers lay upon the cargo within the open square of the hatch, while the other timber lay beneath and entirely or partly outboard of the outboard-

curving lower edge of the starboard hatch coaming, the top surface of the latter timber being close to the edge of the coaming and beneath the deck. In an effort to bring the two timbers together and into the open area of the hatch square, libellant and his fellow employees had placed a double-eyed wire rope sling, provided with a sliding hook movable between the eyes thereof, around the two timbers at a location two or three feet from their after ends. The two eyes of the sling were then placed upon the cargo hook of the up-and-down boom runner and a signal given by the stevedore gangwayman to the winchman to "take up the slack". The winchman complied with the signal, and during this operation libellant stood clear upon other timbers forming a part of the cargo, within the open square of the hatch. There was some testimony that when the slack was taken up by the winchman, the two timbers slid toward each other in the sling, the timber which had been under the lower edge of the hatch coaming moving or commencing to move toward the timber which lay within the open hatch square. After the slack had been taken up by the winchman, the same signaller called for the "taking of a strain" upon the cargo runner. The winchman again responded, the two-post topping-lift broke and the head of the up-and-down boom, with its attached cargo and topping-lift blocks, fell to the top of the cargo within the hatch square.

The topping-lift had been rigged in a double purchase and had been supporting the head of the boom. The wire rope constituting the topping-lift extended from a shackle on the topping-lift block at the cross-tree of the mast, through a block at the boom head, back through the mast block, down the mast, through a block welded to the mast table, and thence around a drum of the winch. When the boom fell, libellant was knocked down, either by the [fol. 18] boom itself or its appurtenant tackle, and thus sustained numerous serious and permanent disabling orthopedic and neurological injuries.

Alleging that he was impliedly invited by the vessel and her owner to participate in her unloading, libellant charges that his injuries proximately resulted from the negligence of such owner, its agents and servants, and from the unseaworthiness of the vessel. More particularly,

libellant asserts that the topping-lift which parted and permitted the boom to fall was, to the knowledge of the vessel's owner, "worn, frayed and damaged", and that "the equipment attached to . . . the boom . . . was insufficient, defective, inadequate and unsuited to handle the transfer of said cargo."

Libellant's employer is impleaded as a respondent upon the vessel's contention that the sole cause of the breaking of the topping-lift, and the consequent fall of the boom, was the active negligence or improper conduct of the libellant's fellow employees in the handling of the cargo and unloading gear. By reason thereof the vessel seeks indemnification under the 56th Admiralty Rule.

At the commencement of the trial, the following facts were stipulated: (1) the topping-lift cable (which admittedly parted and permitted the boom to fall) had been rigged and installed following the launching of the vessel in June 1952, and had not been replaced prior to the accident here involved; (2) the port or up-and-down boom winch, which was being operated at the time the topping-lift cable parted, had also been installed following the launching of the vessel, and had a rated three-ton capacity, with 18 German horse-power; (3) this winch was equipped with a device which automatically interrupted its operation upon the application of a burden exceeding the capacity of the winch; (4) the vessel and her loading gear had been inspected by the ship's surveyor on June 5, 1952, and there had been subsequent annual inspections of such gear.

[fol. 19]. It is elementary that the vessel owed libellant longshoreman the non-delegable obligation of seaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot v. Haïen*, 346 U. S. 406; *Alaska Steamship Co. Inc. v. Petterson*, 347 U. S. 396. This obligation required only that the vessel and its equipment "be reasonably fit for the use for which it was intended." *Berti v. Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 400.

THE TOPPING-LIFT

The topping-lift which supported the boom before it fell had been installed in its position at the time the vessel

was originally rigged in May or June, 1952. There was much evidence about the topping-lift which parted.¹ I find

¹ There were two sets of exhibits of wire rope, each set purporting to consist of pieces of the topping-lift which parted and permitted the fall of the boom. Libellant offered L-10 and L-13; respondent vessel offered R-38 and R-39-a, b and c. L-10 and L-13 are respectively two pieces of obviously rusty wire rope consisting of six strands around a center hemp core, each strand consisting of 19 individual wires around a smaller hemp center. L-10 is a piece approximately 5 feet in length, having a diameter of $7/8$ of an inch and a circumference of $2\frac{1}{2}$ inches, one of the ends of which has been subjected to some crushing or pinching force, but the strands at this end are not unravelled. For a distance of about 18 inches from the other end the strands are unravelled and the individual wires of some of the strands are unravelled from their center cores. This exhibit is corroded throughout, the hemp cores are completely dry, the individual wires are brittle and break readily when bent with the fingers. There is no evidence of any internal or external lubricant or preservative upon the exhibit. L-13 is apparently a piece of the same type of wire rope, approximately the same length as L-10, and manifests the same characteristics of corrosion, dryness, brittleness and the absence of lubricant or preservative. The strands for some distance from each end of L-13 have been unravelled and the center core of the exhibit has been exposed for a distance of about 18 inches.

All witnesses who testified after an inspection or analysis of each of these exhibits (L-10 and L-13) were of the opinion that the exhibits manifested conditions of such deterioration as to render them unsuitable and dangerous for use as a topping-lift or as any other element of standing or running gear of the cargo handling facilities of which the fallen boom in this case was a part. Several witnesses testified for libellant that these two exhibits formed parts of the topping-lift which parted and permitted the fall of the boom which injured libellant. Costa, the head foreman of Nacirema (libellant's employer) testified that, shortly after the boom had fallen, he found L-10 lying on the deck of the vessel between the two winches which served hatch No. 1, and that he made comparison and found it similar to the part of the topping-lift which extended out from the drum of the port winch and hung over the block which was welded to the mast table near the winches. The witness showed this piece of wire rope to a representative of Travelers Insurance Company who was on the pier at which the vessel was moored and at whose suggestion the witness placed the exhibit in the trunk of his automobile and ultimately transported it to his home, where he kept it in his garage until October 5, 1955, when he turned it over to another representative of the same insurance company.

Another fellow-employee of libellant, one Dominguez, classified as a gearman for Nacirema, whose duty it was to supply the steve-

[fol. 20] it was rigged in a double-purchase and consisted of 6 × 24 mild plow steel wire rope 2" in circumference. Since

dore gangs with articles of gear for their use, was requested by libellant's foreman to cut off a piece of the broken topping-lift which protruded from or hung over the welded block at the base of the mast, in order that the sample might be used as evidence. This witness testified that he accordingly cut off the piece as directed and gave it to another fellow employee of libellant, one Willie Smith, by whom the cut piece of wire rope was delivered to libellant's attorney who retained custody of it (except during periods of its submission to metallurgical and chemical tests) until it was marked L-13 in evidence upon the trial. Holmes, another member of libellant's gang, identified the exhibit as the piece which he saw Dominguez cut off the portion of broken topping-lift shown in the photograph L-12. Some further corroboration may be found in the testimony of longshoreman Breitenbach of libellant's contention that L-13 is a piece of the topping-lift which broke. Dominguez further testified that this piece (L-13) appeared to be the same in size, color and condition as the topping-lift from which he says that he cut it.

Willie Smith, another of libellant's fellow longshoremen, testified that he gave L-13 (the piece which Dominguez cut from one end of the broken topping-lift shown in the photograph L-12) to libellant's attorney and that its appearance, when it was marked in evidence on the trial, was the same as it had been when he gave it to the attorney. Smith also testified that the same two pieces of timber which were being handled when the boom fell were successfully removed from the same positions two days later in a similar manner, but without difficulty.

On cross-examination this witness admitted that there was not clearance enough between the top of timber No. 2 to permit it to be rolled and, therefore, that it was necessary to slide it from under the lip of the coaming. (If the timber was 10" x 10" in girth and it were to be rolled, its diagonal would be slightly over 14 inches.) Smith admitted that when he heard the warning of the falling boom he did not have time to notice whether timber No. 2 had jammed against the coaming lip.

Another fellow-employee of libellant, Mason, who was working with him on the inshore side of hatch No. 1, testified that when they initially addressed themselves to the two timbers one was partly under the coaming and the other under the lip of the coaming. He and his fellows pulled the first timber out into the square of the hatch and then turned it over once. Libellant then pried up the second timber which, before the insertion of the pry bar, appeared to have a clearance of 3 inches between the top of the timber and the lip of the coaming. When libellant had thus pried up the timber, Mason inserted a piece of wood beneath it about a foot and a half from its after end, timber No. 1 having already been

[fol. 21] she had been launched and placed in commission, the vessel had been plying between different ports in the

elevated by the insertion beneath it of another piece of wood. Mason then placed the sling upon the cargo hook. He says that then he made an observation to determine whether all was clear and noted that the clearance between timber No. 2 and the lip of the coaming was less than the three inches which had previously existed. It was Mason who then signalled to the winchman first to take up the slack and then to take a strain. He says that both timbers then commenced to move toward the open hatch square, and, when a member of the deck crew cried out a warning that the boom was falling, the timbers were still moving slightly. Another member (Strother) of libellant's work gang says that the taking of the strain caused timber No. 1 to move toward timber No. 2. Mason emphatically stated that there was no jamming of timber No. 2 whatsoever, and that it never touched the coaming nor the lip thereof. He also identified the obviously torn end of the wire rope shown in photograph L-12 and says that it was a portion of the topping-lift which separated and was similar in color and size to the piece of wire rope marked L-13. He also corroborates Smith's testimony to the effect that both timbers were removed two days later by the same procedure.

The witness Sasson, Nacirema's superintendent, was not present when the boom fell, but arrived some 15 minutes thereafter. He testified that Costa showed him a piece of cable which was black on the outside and rusty within, and similar in appearance to L-10. He found the sling still around the timbers, observed that there was clearance between timber No. 2 and the coaming lip, and noticed no evidence of jamming on the timber or of damage to the sling. He says that the piece of topping-lift which hung from the block at the cross-tree of the mast was similar in size and color to L-10. This witness also testified that the two timbers remained in the same respective positions in which they were when the boom fell until they were removed from the hatch on Monday, two days later, and that, in the interval, the topping-lifts on both the port and starboard booms serving hatch No. 1 had been replaced by the vessel's crew.

One James Walker, business agent of the union to which libellant and his fellow-employees belong, came to the scene of the accident in response to a telephone call from Breitenbach and arrived after the libellant had been removed to the hospital. Walker observed that the sling was still about the two timbers, one of which was under the lip of the coaming and the other in the hatch square but both of which were close together. He inspected this sling and found no damage to it, taking no note of any damage to either of the timbers. Walker says that at the time of his inspection there was a clearance of approximately one and a half inches between timber No. 2 and the lip of the coaming and clearance of over one

[fol. 22] Caribbean area and her loading and unloading gear at hatch No. 1 had been in frequent use, handling a variety

inch between the sling and the coaming lip. He says he found no evidence of jamming of the timber against the coaming lip. This witness further testified that he saw one end of the topping-lift hanging from the mast block at the cross-tree, and another piece at the bottom extending over the mast table block as shown in the photograph L-12. While he was in the vicinity the witness Smith showed him a piece of what he said was the topping-lift and which was later given to libellant's proctor (L-13). It was this witness (Walker) who called Mr. Brass, the proctor for libellant, who arrived on board at about 11:00 A. M., and proceeded to take the numerous photographs which have been marked in evidence in behalf of the libellant.

On the afternoon of the same day (January 2, 1954) the vessel and her gear were jointly inspected by Captain George N. Axiotes, as Surveyor for Nacirema, and Otar Grundvig, as Surveyor for the vessel. Axiotes says that the standing part of the broken topping-lift was hanging from the upper mast block, that it was three-quarters of an inch in diameter and that its condition and appearance was similar in all respects to Exhibit L-13. He also saw the sling still about the two timbers in the hatch with one eye attached to the cargo hook and reports no damage to the sling or evidence of damage to the after end of timber No. 2. This witness did admit that there was a mark upon this timber resembling the paint on the coaming edge, but says that it evidently did not result from loading or unloading, but probably was due to some contact between the edge of the timber with the edge of the coaming. His measurement of the end of each of the timbers indicated that their dimensions were 8" x 8". This surveyor was of the opinion that if there had been a jamming of the timber against the coaming the topping-lift would be the last part of the gear to let go and that if more than a three-ton load had been imposed upon the winch, it would have stopped automatically, according to information given him by the vessel's first officer who accompanied him during his inspection.

Each of the winch operators testified. The testimony of Harps who operated the up-and-down boom winch is elsewhere herein-after reviewed. Crowther, the operator of the starboard winch at the time the up-and-down boom fell into hatch No. 1 says that his winch was not in operation and he was standing by the machine smoking. He it was who cried out when he saw the boom coming down, and later he saw Costa with a piece of rusty wire cable in his hand which he said is L-10 and resembled the broken end of the topping-lift which he observed hanging over the block welded to the mast table.

Several witnesses in behalf of the respondent vessel denied that L-10 and L-13 were pieces of the topping-lift which parted, but that, on the contrary, Exhibits R-38 and R-39-a, b and c constituted

[fol. 23] of cargo loads. The so-called "safe working load" of the boom and of the cargo runner (the latter measuring $2\frac{1}{2}$ "

portions of the wire rope which formed the topping-lift at the time the boom fell. There seems to be no contradiction that the topping-lift which was in position at the time the unloading operations were turned over to libellant and his fellow stevedores, was rigged substantially in the manner exemplified in the model of a portion of the vessel, marked R-13 in evidence. According to respondent's witnesses, one end of the topping-lift terminated in an eye surrounding a thimble which was secured by a shackle to the bottom of a single-sheave block at the cross-tree of the mast, thence extended through the single-sheave block at the head of the boom, thence back through the sheave of the first-mentioned block, thence down the mast and through a block welded to the mast table near the port winch, and thence around a drum of that winch. These witnesses say that the topping-lift (which was installed when the vessel was launched, and which admittedly parted at the time of the fall of the boom on January 2, 1954) was composed of mild plow steel wire rope, of 6 x 24 construction, with a hemp center in each strand and a hemp core in the midst of the strands. This rope was $\frac{5}{8}$ " in diameter and 2" in circumference. This circumferential measurement was indicated for the topping-lift on the rigging plan which was marked Exhibit R-40 in evidence, and to which the captain of the vessel (Peters) says her rigging conformed when she was fitted out after launching.

R-38 is a piece of 6 x 24 wire rope, approximately six feet in length, at one end of which the strands are widely unravelled, and, for a longer distance from that end, one of the strands has apparently been manually unravelled from the remaining strands in their normal position. The opposite end of this exhibit is prevented from unravelling by a temporary serving of twine and its strands and wires appear to have been manually cut. The other end of the exhibit indicates that the strands and wires parted under strain. Throughout its length this exhibit, and also R-39-a, b and c, are black in color, and evidently have been covered with grease which still comes off readily on the hands of one who handles them. While the individual wires at the end of this exhibit have apparently parted under strain and show some corrosion, the corrosion appears to be of a character and degree which would normally take place during the period between January 2, 1954 and the time of trial. The exhibit exposes for some distance from the end the center hemp core of the rope which is also greasy to the touch and by observation. R-39-a is obviously another portion of the same rope of which R-38 originally formed a part. The latter exhibit is approximately 24 feet in length, one end of which is in the form of an eye surrounding a steel thimble, and the opposite end apparently has been manually cut and is served with wire. R-39-b and R-39-c are seemingly pieces of the same wire rope of which the other exhibits

[fol. 24] in circumference) was, according to the stipulation of the parties, three tons each. Single wires taken from R-

formed a part. R-39-b consists of a piece approximately four feet long, evidently manually cut at each end, one end of which is served with wire and the other is unserved, but neither end of which is unravelled, while R-39-c is a short piece of what is said to be the same rope as that from which the other pieces were taken. This exhibit is not unravelled, is served with wire at one end, and with twine at the opposite end and between the ends. There was testimony (necessarily uncontradicted) that another portion of the topping-lift, of which respondent contends Exhibits R-38 and R-39-a, b and c were parts, was taken to Bremerhaven, Germany, the place at which the vessel was built, for purposes of testing, and was not subsequently returned to this country.

Peter Peters, the Captain of the vessel (who was, with his First Mate, Herman Buss, in his quarters just abaft the No. 1 hatch at the time of the accident), testified that he heard the noise of the fall of the boom and immediately came out, with his First Mate, and inspected the conditions of the scene. He saw the boom lying on the cargo and the libellant lying near the boom. He also observed the two timbers (above referred to as No. 1 and No. 2) surrounded by the sling. One eye of the sling was still attached to the cargo hook. The Captain says that he and Buss inspected the two broken ends of the topping-lift; one of which was hanging down the mast and the other was lying on the deck at the foot of the mast. He describes the topping-lift as in good condition, black in color and covered with grease which had been applied to preserve it. He identifies R-38 and R-39-a, b and c as being pieces of the topping-lift which parted, and which, like these exhibits (so found by the Court's actual measurement) were 2" in circumference. Captain Peters was assigned to the vessel while she was in course of construction at Bremerhaven, Germany, in November 1951, and he testified that the topping-lift which parted on January 2, 1954 at Port Newark, New Jersey, was the same topping-lift which had been installed upon the particular boom when the vessel was initially rigged and that the Exhibits R-38 and R-39-a, b and c, were actual pieces of that topping-lift taken and kept in the custody of the vessel (and examining experts) from the time they were replaced following the fall of the boom until they were admitted in evidence on the trial. This authentication of identity of these respondent's exhibits with the topping-lift which parted was corroborated by the testimony of the First Mate, who says that, at the request of libellant's witness, Axiotes (who inspected the vessel and her gear shortly after the boom fell) he (Buss) cut off a piece of a strand, about a foot in length, from the portion of the broken topping-lift which was hanging from the mast cross-tree. This was then wrapped in a piece of newspaper by Captain Peters and given to Captain Axiotes who placed it in his pocket, after which

[fol. 25] 38, and tested by Isaac Stewart, Chief Engineer of the New York Testing Laboratories, disclosed a breaking

the two ship's officers and Axiotes had coffee in the Captain's quarters, where libellant's proctor found them upon his arrival, within an hour or so after the accident had occurred. It was later on the same day, according to the testimony of Buss, that the broken topping-lift was removed from the up-and-down boom (as was the topping-lift which served the Burton boom at the same hatch) and that, because the vessel had no more rope of the same circumference (2"), the two topping-lifts were replaced by new wire rope 2½" in circumference. The broken sections of the topping-lift of the up-and-down boom, according to the testimony of Buss, were placed in a locker on board the vessel where they remained until a portion of one of them was submitted for testing in Germany, and the other portions (R-38 and R-39-a, b and c) were examined and tested in the United States. The piece of strand which Buss says he cut off and which was given to libellant's expert Axiotes, is shown to be missing from R-38. Axiotes confirmed his receipt from Buss of this 12-inch piece of strand.

Olaf Jacobsen, an agent of the vessel, came aboard about an hour before the boom fell and was in the Captain's quarters at the time the accident occurred. He also observed the position of the boom after it had fallen, and saw one portion of the broken topping-lift hanging from the cross-tree and the other portion lying on the deck. He testified also that both portions of the severed cable were black in color, ¾" in diameter and that R-38 and R-39-a, b and c are pieces of the same topping-lift. He testified that one end of R-38 had been manually cut, while the other end of the same exhibit had been broken or torn. The end of R-39 opposite that which formed the eye had also been manually cut. Jacobsen says he found no evidence of corrosion on the broken end of R-38.

Joachen Gimm was the member of the crew of the vessel whose duty, he says, was to apply protective grease to the topping-lift cable periodically. His attention also was attracted to the fall of the boom by the sound thereof and, under the orders of the Mate, he fetched his camera and took photographs of objects and conditions immediately succeeding and at the scene of the accident. He testified that the parted topping-lift was in two pieces, one hanging from the block at the cross-tree on the mast to a point about two or three feet above the deck, and one end of the other piece lying on the deck with its opposite end around the drum of the port winch. He denied that a separate piece of cable similar to either L-10 or L-13 was lying on the deck. He identified R-38 and R-39-a, b and c as pieces of the broken topping-lift which he described as being black in color and composed of wire two inches in circumference, to which he had applied, by hand, with pieces of waste, protective grease two or three weeks prior to the fall of the boom.

point of between 158 and 177 pounds. He computed the tensile strength of the entire wire rope at 19,600 pounds, representing 80% of the product of the average strength of the individual component wires by the number of the wires. Mr. Stewart defined the safe working load of a rope as represented by one-fifth of its breaking load. Accordingly, the safe working load of R-38 would be approximately two tons

Another member of the crew, who participated with Gimm (according to the latter's testimony) in applying the protective grease to the topping-lift, was Carl Heinrichsdorff. His testimony, together with that of August Otto, was taken at Bremen, Germany, under commission upon interrogatories and cross-interrogatories as a witness for the respondent vessel. Heinrichsdorff testified that he did not know the size of the wire rope constituting the topping-lift on the date of the accident, nor the size of the wire rope constituting the guys or the runner of the up-and-down boom. He did testify that the topping-lift was rigged in a double-purchase involving the use of three blocks, and that the boom stood amidship at the No. 1 hatch when he observed it before the accident. He was apparently not asked what, if anything, he had to do with the maintenance of the topping-lift cable.

Buss, the First Mate, had also joined the vessel while she was being rigged after launching, in May or June 1952, in Bremerhaven, Germany. He testified that the booms at No. 1 hatch were provided with topping-lifts 2" in circumference, rigged in double-purchase as called for by the rigging plan marked R-40 in evidence, and that there had been no change in or replacement of these topping-lifts between the time of their initial (sic) installation and the fall of the boom on January 2, 1954. He corroborated Gimm in testifying that these topping-lifts were treated with preservative every two or three weeks and that the last application of the preservative to the topping-lifts had been made at Puerto Cabezas, Nicaragua, from which the vessel had sailed for Port Newark, New Jersey in December, 1953. Buss testified that the topping-lift had been taken down and inspected by him in May and again in August, 1953. In addition to his emphatic insistence that R-39 and R-39-a, b and c were portions of the topping-lift with which the boom was provided and which parted, Buss denied that wire rope of the size of L-10 and L-13 was ever used for topping-lift purposes on the vessel before the accident involved in this case, and that if the latter exhibits were actually taken from the vessel, they were pieces of mooring line left over from mooring line repairs, which were frequently required by reason of the frequent immersions, exposure and strains attendant upon their use and the impracticality of treatment with lubricant or preservative of wire devoted to such use.

if it were rigged in a single purchase, but its double-purchase arrangement would render it stronger by at least 50%. I conclude, therefore, that the safe working load of the topping-lift with which we are here concerned was at least three tons. It was the opinion of Stewart, as well as that of respondent's witness Otar Grundvig, a Marine Surveyor, who also examined it, that the topping-lift which parted was in good condition and appeared to be "very good wire". On the other hand, libellant's witnesses, John P. Brady, a Chemical Engineer, and Theodore A. Schneider, an Assistant Professor of mechanical engineering, each of whom examined R-38 and R-39 over two years after the topping-lift parted, were of the opinion that the rope was in a condition rendering it unsafe for use as a topping-lift with gear of the rated capacity stipulated for the boom and runner serving No. 1 hatch on the vessel in question. Brady found the exhibits pliable, greasy and dirty, indicating deck and handling wear, manifesting evidence that the wires had been galvanized, with a consequent reduction of tensile strength below what the witness believed would be the factor of safety. Schneider found the wire insufficiently lubricated, its core dry and some evidence of corrosion, conditions which, in his opinion, rendered the wire rope unsafe for use as a topping-lift for the boom.

It was also the opinion of Robert A. Simons, a Marine Engineer and designer of topping-lifts for vessels, that a topping-lift should be equal to or greater than the cargo runner in diameter and circumference.

[fol. 26] Walter J. Byrne, Industrial and Marine Safety Consultant (who with Simons also testified for the respondent-impleaded), said that he had never seen a two-part topping-lift of wire rope $\frac{5}{8}$ " in diameter on any vessel, although he had inspected thousands. Byrne considered a topping-lift *running* rather than *standing* gear because of its function to raise and lower, as well as to hold, the boom, and he disapproved of the use of $\frac{5}{8}$ " wire rope as a topping-lift, rigged in a double purchase. Byrne admitted, however, that there was nothing wrong with a two-part topping-lift, provided the size of the rope was appropriate, and he added that a $\frac{5}{8}$ " wire in one position could be stronger than an inch wire in another position.

Since I am persuaded that the topping-lift which failed, and its condition, is exemplified in the exhibits R-38 and R-39, and since the testimony is uncontradicted that that topping-lift had been in use since the initial rigging of the vessel in June 1952, apparently with the same boom and a cargo runner of the same rated capacity as at the time of the accident, I find that the topping-lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended.

THE PORT WINCH

I am satisfied by the evidence in this case that, just prior to the fall of the boom which caused the libellant to sustain injuries, power was being furnished to this up-and-down boom by the port winch, which was located just forward of hatch No. 1, and which was being operated (as was the starboard winch which powered the Burton boom) by a fellow-employee of libellant.

The operation of the winch which served the boom which fell is disclosed by the testimony of Winchman Harps, another employee of Nacirema, who tells us that when Mason signalled to him to take up the slack, he moved [fol. 27] the control lever slightly and then stopped, presumably responsive to a further signal. Mason then signalled for the taking of a strain and Harps pushed the operating lever slightly further forward but not to a degree which would apply full power to the motor. It was upon this second power application that the topping-lift parted and the boom fell. Harps says that he saw the portion of the broken topping-lift disclosed in the photograph L-12 and that it had an appearance and was in a condition similar to that of the pieces of wire rope marked L-10 and L-13 respectively.

As stipulated at the commencement of the trial, this port winch was provided with a device set to interrupt its operation when a load or burden in excess of its capacity was imposed upon it. More specifically, in answer to interrogatory numbered 29 of those propounded by the respondent-impleaded to the vessel, requesting specifica-

tion whether the winch "contained a device by which its operation ceased upon the application of a burden in excess of its capacity," the vessel responded affirmatively. The First Mate, Buss, testified at length with respect to the nature and manner of functioning of the so-called "cut-off" device to which the interrogatory referred. Using a diagrammatic illustration upon the blackboard, Buss explained that the winch, rated at 18 German horse power, was driven by electricity, the current being applied through a rheostat which regulated the quantity of the current flowing through the motor. As the Court understands the First officer's explanation, the "cut-off" device consisted of a circuit breaker, actuated by an induced magnetic current. Transmission of the power from the motor was controlled by a lever actuating a clutch arrangement. When the lever was pushed forward by (away from) the operator of the winch, the draft on the cargo runner was raised or hoisted, and when the lever was pulled backward (toward the winch operator), the draft was lowered. The vertical position [fol. 28] of the lever, while permitting the motor to continue to run, kept the clutch in neutral, so that the drums on the winch did not receive the torque of the motor.

Libellant and his fellow employees Mason, Strother and Smith were working on the inshore side of No. 1 hatch, and, between the time of the commencement of their work that morning and the time of the fall of the boom, they had been "building" lumber, i.e. piling or making-up drafts which were picked up by slings attached to the hook on the runner. At about 9:00 A. M., the stowed timber cargo in the hold of No. 1 hatch had been lowered to a point below the level of the deck, and libellant and Mason then undertook to prepare for removal two timbers which lay longitudinally of the vessel, in the hold, and which measured between 30 and 35 feet in length and (as estimated) 8" x 8" or 10" x 10" in girth. One of these timbers lay within the open square of the hatch, while the other lay with its after end to the inshore side of the under-curving lip of the starboard hatch coaming, two or three feet forward of the after coaming of the hatch, the forward end of this timber lying near the forward end of the hatch and well below the lip and edge of the starboard coaming.

Libellant, with a crow or pinch bar, had pried up the after end of the timber which was beneath the deck, and his fellow employee, Mason, then put a wooden chock beneath the timber. Libellant then removed the bar, and his partner then placed a wire rope sling (furnished by the stevedore contractor and similar in appearance to IR-1 in evidence) around that timber and also around the timber which lay within the open square of the hatch, so that the sling passed around both timbers at a point approximately one foot forward of their respective after ends. Mason says he then looked at the inshore timber to see whether it would clear the coaming and then hooked the eyes of the sling on the hook at the end of the cargo runner. Thereupon, according to the testimony of libellant, in which he was generally corroborated by Mason, they both stood [fol. 29] clear of the timbers at a distance of about six or seven feet, and Mason signalled to the port winchman to "take up the slack". Mason says that the winchman responded appropriately and was then stopped by a further signal from him. Mason next signalled to the winchman to "take a strain". Mason says that, upon the response of the winch to the latter signal, the sling tightened and the timber which was inshore of the hatch coaming commenced to move towards the square, when suddenly a cry was heard from someone on deck to "look out", and, while the timber was still moving slightly, the boom fell upon the cargo in the hatch square, and the block or blocks at the head of the boom struck and knocked libellant down. Both libellant and Mason say that the inshore timber did not "jam" against the edge of the lip of the starboard coaming, and that before the slack was taken up by the winch operator, there appeared to be a clearance between the timber and the edge of the coaming of something under three inches.

Victor Harps, the operator of the port winch (who was another fellow employee of libellant), testified that when Mason put the eyes of the sling on the cargo hook, he signalled to him to take up the slack, and that he did so and then stopped. Upon the signal for the taking of a strain, the winch operator applied more (but less than full) power, and thereupon the boom and the topping-lift fell. The winchman says that as soon as he applied the

strain he heard the other winchman holler and saw the boom fall. Harps said that one of the members of the vessel's crew had showed him a switch by means of which he could shut off the power of the winch, but he had received no instructions from anyone how to operate the winch.

Edward Crowther, the operator of the starboard winch, testified that his attention was first directed to the falling of the boom when he heard a noise and looked around. This winchman had previously slacked off his winch when the up-and-down cargo hook was lowered by the other winch [fol. 30] into the hatch square by Harps. No one, apparently, observed or described the movements of the head of the boom under the effect of the application of power to the winch immediately before the boom fell.

Before the stevedores came aboard at 8:00 o'clock that morning, the vessel's crew had hoisted the boom to a position with its head above and perpendicular to a point in the center line of the hatch square. There was also testimony that the stevedores were forbidden to change the angle of the boom with the deck, but that the stevedores changed the position of the head of the boom to a position above and perpendicular to a point two feet to port of the port hatch coaming, and about one-third of the length of that coaming forward of its after end. It also appeared (without contradiction) that libellant's fellow-employees changed the points of fastening of the port boom preventer and guy respectively—the preventer to a cleat on a stiffener in the rail of the vessel opposite a point approximately one-third of the distance forward from the after end of the hatch and one and one-half feet above the deck, and inboard from the rail, and the guy to a point on the rail approximately two-thirds forward of the after end of the port hatch coaming.

After the boom fell, the Captain of the vessel, its first officer, the seaman Gimm, Captain Jacobsen and Inspector Grundvig examined the position of the inshore timber with respect to the inshore edge of the under lip of the hatch coaming. They testified that they found the upper inboard edge of the timber for a short distance forward of its after end to have been in contact with and to have been dented

by and stained with red paint from the inshore edge of the coaming lip. Numerous photographs were offered in behalf of libellant and respondent vessel respectively, and were marked in evidence. L-16 taken by libellant's attorney, for example, shows the sling around the two timbers, and a portion of the after end of the inshore timber well under and somewhat to the inshore side of the hatch square [fol. 31] face of the starboard coaming. This position is more clearly and impressively shown in R-1, R-5, R-14, R-16, R-17, R-25, R-36 and especially in R-6. Despite testimony to the contrary given by libellant and his fellow employees, I am persuaded by the clear weight of the evidence that either the taking of the slack or the taking of a strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than to slide) toward the off-shore edge of the under lip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping-lift of the boom such an excessive strain as to cause it to break and the boom to fall.

The question immediately arises: Why did the power running to the winch fail to shut off automatically if and when an excessive load was built up as above concluded?

Assuming the respective dimensions and safe working loads of the respective components of the gear, the positions of the port boom and its preventer and guy, the direction of the cargo runner extending from the boom head to the sling around the two timbers (as disclosed by testimony offered in behalf of the vessel), and the obstruction by the lower edge of the starboard hatch coaming to the movement into the hatch square of the offshore timber, respondent's witness, Isaac Stewart, by the erection of triangles, the determination of angles and the application of the law of the parallelogram of forces, calculated that when the operator of the port winch took a strain in response to the gangwayman's signal to do so, a load or burden was suddenly applied to the topping-lift of the port boom amounting to 42,300 pounds. On the other hand, the witness Robert A. Simons, testifying as an expert in behalf of the respondent-

impleaded, calculated, upon similar factual assumptions, that the load imposed upon the topping-lift by the positions of the vang's when the power was applied to the winch as [fol. 32] aforesaid, was 34,000 pounds. It is apparent, therefore, that the topping-lift parted under a strain of between 17 and 21 tons, or several times the safe working load of the topping-lift and other units comprising the unloading gear. It has been stipulated that the winch was provided with a device designed and set to shut off the current to the winch upon the application of a load of slightly in excess of six tons. After the topping-lift parted and the boom fell, an inspection of the winch indicated that the cut-off device had functioned, but the Court is unable to find in the evidence at what instant and under what strain the current was cut off. Harps, the winch operator, testified that he had applied less than full power to the winch when the topping-lift parted. The effect of the quantity of current flow upon the power developed by the motor is explained by the witness Simons, as follows:

"The greater the current applied to a motor, and therefore applied to the winch, the more horse power and torque the motor will have and, therefore, the more pull on the load or on the hoist wire. In other words, the greater the current that goes through that motor, the more power you are supplying to the motor, and the more power you are going to get out of that motor, and the more lift from the motor." a

The witness added that "what ultimately shuts the current off is the resistance to that horse power of the motor * * * to be found in the load which is being hoisted." There was testimony uncontradicted, that after the boom had fallen, Buss undertook to operate the winch, noticed that the cut-off device had functioned, threw a switch necessary to restore current flow, and then demonstrated that the winch operated perfectly. The cut-off device was susceptible of being so adjusted as to operate automatically at different degrees of excess load on the gear. In this case, apparently, the device was set to function at a much lighter load than [fol. 33] was imposed upon the gear although it was set

to operate at a load slightly more than twice the safe working load of the topping lift.

THE LIABILITY OF THE VESSEL

I conclude on the basis of the facts as found above that the setting of the winch cut-off device at the time the winch was turned over to libellant's fellow-employees for operation rendered the respondent vessel unseaworthy and therefore liable to libellant.

THE PROXIMATE CAUSE OF THE ACCIDENT

Having found as a fact that the efforts of Nacirema to extract from beneath the deck the timber which lay or was drawn against the under-lip of the coaming, and that the positioning, by Nacirema employees, of the head of the boom and the preventer and guy created a load on the topping-lift greatly in excess of its safe working load, I cannot avoid the conclusion that the primary cause of the parting of the topping-lift and consequent fall of the boom which inflicted the bodily injuries upon the libellant is to be found in the impropriety and negligence of Nacirema in its handling of the gear and winch.

THE VESSEL'S RIGHT TO INDEMNITY

There was no contract between the owner of the vessel and Nacirema. On the contrary, one John Joseph Smith, President of Insular Navigation Company, steamship agents and brokers, testified on deposition taken by the respondent that Insular Navigation Company, acting in behalf of Ovido Compania Naviera S.A. Panama, executed a written contract with Nacirema for the unloading of the vessel at Port Newark, New Jersey. The vessel had been chartered by the owners to Ovido through Insular. Neither the charterer nor its agent is a party to this litigation.

[fol. 34] Nevertheless, libellant and his fellow employees of Nacirema were impliedly, if not expressly, invited to come and be aboard the vessel for the purpose of unloading her cargo and to use the vessel's tackle and gear in a manner appropriate for that purpose. Cf. *Pope & Talbott, Inc.*

v. Hawn, 346 U. S. 406; *Freitas v. Pacific-Atlantic Steamship Co.*, 9 Cir., 218 F. 2d 562. Entirely apart from its obligation under its contract with the agent for the charterer of the respondent vessel, Nacirema owed the vessel and her owners the duty of using due care in her unloading. *Cornet v. Baltimore & Ohio R. Co.*, 4 Cir., 48 F. 2d 497; *Seaboard Stevedoring Corp. v. Sagadahoc S. S. Co.*, 9 Cir., 32 F. 2d 886. See also, *Rich v. United States*, 2 Cir., 177 F. 2d 688.

In the language of Judge Frank in *Palazzolo v. Pan-Atlantic Steamship Corp.*, 2 Cir., 211 F. 2d 277, 279, affd. sub nom. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.* by an equally divided Court, 349 U. S. 901:

"indemnity over is recoverable where, as here, the employer's negligence was the 'sole' 'active' or 'primary' cause of the accident. Nor does the absence of a formal contract bar indemnity" (citing *Rich v. United States*, *supra*).

The vessel in the case at bar does not seek contribution from the stevedoring contractor as a joint tort-feasor, as was the situation in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. The respondent vessel in the present case asserts and I conclude as a matter of law that Nacirema's negligence was the sole, active or primary cause of the parting of the topping-lift and the fall of the boom, with its consequent injuries to the libellant, by reason of the negligent manner in which Nacirema through its employees, attempted to extract the timber from its obstructed position beneath the deck of the vessel. Nacirema may not have breached any contract with the vessel's owners, but, through its servants, it violated a duty which it owed to the [fol. 35] vessel to exercise reasonable care in conducting its unloading operations. I find that it failed to exercise that degree of care and that, as a result thereof, it brought into play the unseaworthy condition of the vessel for which the latter would be liable in damages to libellant under the principles enunciated in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Alaska Steamship Co. v. Petterson*, 347 U. S.

396; and *Berti v. Compagnie De Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397.

The question whether under these circumstances the vessel is entitled to indemnity from the stevedore contractor has recently been discussed by Judge Dawson in *Allen v. States Marine Corporation of Delaware*, S. D. N. Y. 1955, 132 F. Supp. 146. In that action, a longshoreman sought to recover damages for personal injuries from the vessel. The vessel filed a third party complaint against the stevedoring firm employing the longshoreman, alleging that the stevedoring firm was the actual tortfeasor and that consequently the vessel was entitled to indemnity. The stevedoring firm moved to dismiss. Reviewing numerous decisions, Judge Dawson comments (page 148):

"Therefore, the question is whether the relationship of Allports Stevedoring Co., Inc. as the stevedoring company engaged in the unloading operations on their ship imported an implied agreement to indemnify the owner of the ship for any damages which he might have to pay as a result of injuries to employees of the stevedoring company. There was no contractual relation between States Marine Corporation of Delaware and Allports Stevedoring Co., Inc., so that if this liability to indemnify existed, it must be based upon the relationship and not based upon any separate contractual obligation.

"If there had been a contract relationship, the right of indemnity would exist because, as a matter to be implied from the contract, the owner of the ship is [fol. 36] entitled to restitution for any damages which it has suffered due to the failure of the other contracting party to perform the duties necessarily comprehended within the contract. *Barber S. S. Lines v. Quinn Bros.*, D. C. Mass. 1952, 104 F. Supp. 78.

"But it does not seem that the right of indemnity is necessarily predicated upon the existence of a direct contractual relationship between the parties. See *McFall v. Compagnie Maritime Belge*, 1952, 304 N. Y. 314, at page 331, 107 N. E. 2d 463.

"If, as in this case, the shipowner has chartered the ship to another who in turn employs a stevedoring

firm, that stevedoring firm may be held—depending upon the facts which develop at the trial—to have assumed an obligation not alone to the charterer of the ship, but also to the shipowner, to perform its work in such a way that no liability will be imposed upon the shipowner arising out of the active negligence of the company which is actually performing the longshore contract.

“It has been held, at least on motions to dismiss a complaint, that if a vessel owner has been found responsible to a seaman for breach of its non-delegable duty to provide a safe place to work, and that breach resulted from the active negligence of the impleaded defendant and not from any active negligence of the owner of the ship, the owner of the ship would have a right to indemnity. In such an event, an implied contract of indemnity would arise because of the relationship between the parties. *DiMeglio v. The Black Condor*, D. C. S. D. N. Y. 1954, 120 F. Supp. 865; see *Valerio v. American President Lines*, D. C. S. D. N. Y. 1952, 112 F. Supp. 202.”

I concur in the reasoning of Judge Dawson, believing that it sets forth the only reasonable, equitable answer to the question which he and the instant issue poses.

[fol. 37] I therefore conclude that the vessel is entitled to indemnity from Nacirema for the damages to be awarded libellant as hereinafter stated.

INJURIES

Libellant testified that when the boom fell he was struck in the back and pinned to the surface of the cargo of timbers in the hatch. He was unable to determine what hit him, because he was knocked into a prone position upon the cargo and lapsed into unconsciousness after a period of a few moments. When he regained consciousness, a weight, which had been resting upon his lower back, was being lifted from him and he suffered great pain in his chest, right hip, both legs, back, right groin, both knees and left ankle.

After his removal from the hatch, libellant lay on deck for about three-quarters of an hour, and was then trans-

ferred to an ambulance, which transported him to St. James Hospital in Newark. There he underwent six or seven blood transfusions. A week after admission to the hospital he was placed in a plaster body cast, extending from chest to groin, and his left leg was also placed in a cast. He was later placed in traction, a steel pin having been passed through his right knee as a traction attachment. He remained in this position until about April 20, 1954. During this period he was under general sedation, and suffered from nightmares in which he seemed to be imaginatively dodging falling objects. He was discharged from the hospital on April 20, 1954, on crutches, using a brace for his back, which had been provided for him shortly before he left the hospital. He continued to receive treatments from Dr. Edwards (who had attended him while in the hospital), and these treatments continued until June 1, 1954, when he commenced receiving physiotherapy at Presbyterian Hospital in Newark, together with whirlpool treatments for his ankle, heat and massage treatments to his back and diathermy to his groin. These treatments, which were received [fol. 38] thrice weekly, extended over a period from June 1 to December 10, 1954. At the conclusion of that period, he commenced to receive treatments at the hands of a nurse furnished by Travelers Insurance Company in Newark. These treatments continued to February 13, 1955, and consisted of heat and massage. In March of 1955, after further X-rays, libellant commenced undergoing treatments from Dr. Lohman, which consisted of diathermy to his back and electric shock. These continued until February 1956, shortly before the commencement of the trial of this case.

On April 2, 1955, libellant unsuccessfully attempted to earn some money by shining shoes, but after a week's trial, he discontinued his efforts because of intense pain. At the time of trial, libellant was still unable to stand long on his feet, was unable to walk more than a short distance, and still suffered pains in his back, legs, groin and stomach. He is unable to sit long, his pain is increased in inclement weather, and he requires the rigidity of a board beneath his mattress when attempting to sleep. This man still required the aid of a cane in walking, and, at the site of an adherent, permanent two-inch scar, which extends

from the external malleolus of the left ankle down toward the heel, suffers severe pain and limitation of motion.

On X-ray, libellant was found to have suffered fractures of the transverse processes of the first, second and fourth lumbar vertebrae, on the right side, and of the transverse processes of the second and third lumbar vertebrae on the left side, with separation of the fragments. He also suffered a subluxation of the right sacro-iliac joint, and fractures of the superior and inferior rami of the right ischial bone, with marked overriding of the fragments. He further suffered a separation of the symphysis pubix, a comminuted fracture of the inferior ramus of the left pubic bone and a probable fracture of the superior ramus of the right ischial bone with the displacement of fragments. There were also revealed a comminuted fracture of the lower end of the left tibia, involving the medial malleolus [fol. 39] and articular surface, as well as a comminuted fracture of the lower end of the left fibula which included the external malleolus. There was a widening of the ankle joint mortise, with slight forward subluxation of the foot. There was also X-ray evidence of a transverse fracture of the proximal third of the shaft of the right fibula, without displacement of the fragments.

In addition to his numerous and permanently disabling orthopedic injuries, and by them induced, in the opinion of a competent neuropsychiatrist, libellant suffered shock and an anxiety reaction with a conversion hysteria.

I find that libellant suffered the foregoing numerous, severe and continuingly painful and permanently disabling injuries as a proximate result of the fall of the cargo boom hereinabove referred to.

DAMAGES

At the time he was injured on January 2, 1954, libellant, Crumady, was 42 years of age, and had been employed as a longshoreman for eight years previously. I find from the evidence that he suffers a degree of permanent disability which has prevented and will continue to prevent his resuming that occupation. His gross wages for 1953, were \$4,070.45 (according to Internal Revenue Service Forms

W-2 marked L-6 in evidence). Letter of May 8, 1956 to libellant's attorneys from James F. Hughes, Manager of the General Actuarial Division of The Prudential Insurance Company of America, marked exhibit L-46 in evidence, indicates that libellant at age 43 had an expectation of life of 25.03-years (based upon the United States Life Mortality table for non-white males, to which category libellant belongs). The Actuary further states in his letter that the "present value" of \$1.00 per annum* at 3% compound interest, is \$15.9302, from which he computes, upon the assumption of weekly earnings of \$70.00 less taxes, or annual earnings of \$3,640.00, that it would require [fol. 40] a capital fund of \$57,985.93, invested at 3% compound interest, to produce \$70 a week for such expectancy. I conclude that it is improbable that libellant would have continued to earn \$70 a week throughout his life expectancy. At the time of the trial libellant required a cane to assist him in getting about and still suffered pain at certain injury sites in varying degrees of intensity at irregular intervals. Despite the absence of specific evidence so indicating, my observation of libellant and consideration of the nature and degree of his permanent disability leads me to judicially notice the probability that he can still engage in some type of gainful occupation which does not involve heavy manual labor. Under all of the circumstances, therefore, I believe that a principal sum of \$25,000 is a fair amount to award libellant on account of past and future losses of earnings.

Additional items of special damages are medical and hospital expense, as well as taxi fare for trips to and from hospitals as an outpatient, from June 1, to December 10, 1954 (thrice weekly at \$2.00 per round trip). Libellant's care and treatment at St. James Hospital in Newark involved an expense of \$2,411.25, and that at the Presbyterian Hospital in the same City (for outpatient treatments) totalled \$590.90—a grand total for hospital expense and related transportation of \$3,162.15.

In addition to these charges, libellant required treatment by Charles H. Edwards, M. D., at a cost of \$1,005.00. Dr. Herman Lohman, M. D. who treated libellant from May 1955 until February 1956 at his office, rendered a bill in the

amount of \$510.00 (including X-rays necessarily taken by him), and this physician was of the opinion that the persistence of pain at the site of the comminuted fractures of the left tibia and fibula extending into the ankle joint could probably be terminated by a fusion at the ankle joint, which the Doctor estimated would require (sic) hospitalization of from three to three and one-half weeks and the wearing of a cast for from three to three and one-half months, physio-[fol. 41] therapy and post-operative care. The Doctor's estimate of cost for this surgical intervention and attendant expense totalled \$850.00. Thus I reach a total for medical expense of \$2,365.00

Libellant was still completely disabled at the termination of his treatment by Dr. Edwards, who was of the opinion that he would require considerable further treatment. This he received at the hands of Dr. Lohman and in the form of physiotherapy as a hospital outpatient. Dr. Lohman found libellant completely disabled for heavy work at the time of the trial and that he had achieved maximum possible improvement except for the recommended fusion operation. For his pain, suffering, temporary and permanent disability I believe, therefore, that the libellant is entitled to the sum of \$25,000.00.

I therefore award libellant \$55,527.15 against claimant Joachim Hendrik Fisser, as owner of respondent vessel Joachim Hendrik Fisser, and award judgment in a like amount in favor of said claimant, Joachim Hendrik Fisser by way of indemnification and in exoneration of the liability of said vessel, against respondent-impleaded, Nacirema Operating Co. Inc.

The foregoing opinion shall constitute the Court's findings of fact and conclusions of law in this case, and an order for the judgments awarded hereby may be presented in accordance herewith.

Reynier J. Wortendyke, Jr., United States District
Judge.

IN UNITED STATES DISTRICT COURT

DECREE FOR JUDGMENT—August 15, 1956

This cause having duly come on to be heard, in its regular order, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties after trial without jury, and the Court having duly considered the pleadings filed herein, the testimony of the witnesses, the exhibits and the proofs submitted, and it appearing that libellant has filed a libel in rem charging the respondent vessel with being unseaworthy, and the claimant, Hendrik Fisser Aktien Gessellschaft, answering said libel having denied the unseaworthiness of the vessel owned by it and having filed a bond consenting and agreeing that if the libellant recovered, a decree may be entered against claimant, and claimant having filed a petition impleading the respondent-impleaded and charging it with impropriety and negligence in the handling of the respondent's gear and winch, thereby seeking indemnification from the respondent-impleaded, and the Court after due deliberation having rendered and filed an opinion in writing, which is made a part hereof, finding the respondent vessel unseaworthy and awarding the libellant the sum of \$55,527.15 against the claimant, Hendrik Fisser Aktien Gessellschaft, as owner of the respondent vessel, Joachim Hendrik Fisser, and a judgment in a like amount in favor of said claimant, Hendrik Fisser Aktien Gessellschaft, by way of indemnification against respondent-impleaded Nacirema Operating Co., Inc.; it is:

Ordered, Adjudged and Decreed on this 15th day of August, 1956, that the libellant, John H. Crumady, is awarded judgment and shall recover for himself of the respondent, Joachim Hendrik Fisser, her engines, tackle, apparel, etc., and claimant, Hendrik Fisser Aktien Gessellschaft, owner of respondent vessel, the (sic) sum of \$55,527.15, together with his costs to be taxed, including the sum of [fol. 43] \$614.41, paid by the libellant to the court reporter for stenographic fees, and interest thereon from the date hereof-until paid; and it is further

Ordered, Adjudged and Decreed that a judgment in the sum of \$55,527.15, and such interest as is paid thereon, together with libellant's taxed costs is awarded claimant, Hendrik Fisser Aktien Gessellschaft, by way of indemnification of the aforesaid vessel against the respondent-impleaded, Nacirema Operating Co., Inc., and also claimant's taxed costs, including the sum of \$614.41 paid by the claimant to the Court reporter for stenographic fees, upon its petition impleading said respondent-impleaded.

Wortendyke, U. S. D. J.

Dated, August 15, 1956:

[fol. 44]

Claimant's Appendix—Filed March 30, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY, Libellant-Appellant,

—against—

JOACHIM HENDRIK FISSEr, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSEr and/or HENDRIK FISSEr, Respondent-Claimant-Appellee and Appellant,

—against—

NACIREMA OPERATING Co., Inc., Impleaded Respondent.

TRANSCRIPT OF TESTIMONY (EXCERPTS)

CHARLES IRVING HUBERT—for Respondent.

Direct examination.

By Mr. Ciechanowicz:

Q. I believe you testified that all electrical winches have overload protective devices.

A. To the best of my knowledge all the winches I have come across—as a matter of fact, most all electrical motor operating equipment over one horsepower have overload protective devices.

Q. Do you know or can you tell us what the purpose of the overload protective device is?

A. The purpose of the overload protective device is to disconnect the motor from the line when the current exceeds the value for which the device is set. The purpose of that is to protect against damage to the machine.

The Court: You say that the purpose of an overload protective device on a winch is to shut off the power of the engine to the motor?

The Witness: Yes, to the motor.

The Court: For the protection of the motor.

The Witness: Yes, sir. You could say the winch machine, it is a unit.

[fol. 45] HERMANN BUSS—for Respondent.

Direct examination.

By Mr. Cichanowicz:

Q. Did you have anything to do with the setting of this overload device?

A. This overload device is set once by the building-in company.

The Court: By the manufacturer?

The Witness: Not the manufacturer. The extra electrical firm which builds these things into the ship. The manufacturer makes it, sends it to us, and one electrical firm does all the mountings of electric wires and motors and connections.

The Court: The electrical contractor for building the ship.

Q. As I understand it—I don't want to belabor the point—as I understand it, the overload device works only if you get too much current?

A. Yes, sir.

Q. And does the load that is being lifted have any effect on that overload device?

Mr. Monigan: Objected to, if your Honor please.

The Court: He means too much resistance, does he not?

Mr. Monigan: Yes.

The Court: You mean too much resistance, too much load? The automatic device works under too much load?

The Witness: Too much amps. That will be the best.

The Court: Too much amps?

The Witness: Yes.

The Court: Too much current quantity.

[fol. 46] Q. Can you illustrate that by the way a fuse works?

A. That is a very big fuse. You see, you can't use an ordinary fuse. You have to have in there blowing coils to get the sparks away and all the stuff. I think that will be too hard to make it understandable if you don't have nothing to do—

Q. I mean, doesn't it work on the principle of a fuse?

A. The ground principle is the same as the magnetic fuse you have at home.

Q. Now, do you know what kind of an overload device you had on this?

A. A magnetic.

Q. And do you know how it works?

A. Yes.

Q. Will you tell us?

A. The current flowing is getting too high, the magnetic field and the coil is getting too big and so it starts to switch—it shuts the current off.

The Court: Let me take you slowly. When the current gets high—

The Witness: Too high.

The Court: Gets too high, then that induces a magnetic field?

The Witness: Yes, that is a coil like this one with an

iron core, and you have an electric current flowing through is trying to get the right piece of iron to jump up.

The Court: So when the current gets too high the magnetic field in the interrupting device is actuated and the current is cut off.

The Witness: The current is cut off, yes. It is a very big switch. It cuts both off at once, plus and minus. That is a double watt.

[fol. 47] Q. And that has to do only with the electric current?

A. That has only to do with the electric current.

Q. Do you know at what point the cut-off or overload device was set?

A. In our boat, at a hundred per cent plus.

Q. Plus what?

The Court: A hundred per cent of what?

The Witness: Above the ordinary amount the motor takes.

The Court: In other words, twice the capacity?

The Witness: Twice the capacity.

• • • • •
Cross examination.

By Mr. Monigan:

Q. The function of the cut-off was to cease the operation of the winch when it got too much current on the winch, wasn't it?

A. Yes.

• • • • •
The Court: You ascertained that from the stevedore?

The Witness: When the stuff came down, you see, at first I could not find out myself how things like that could occur. Then I found out that they shifted the boom without telling me, and that hooking there underneath and all this thing mounted stuff up.

• • • • •
Q. Well, if the boom would never break, why does it have on it a marking that it has a three-ton capacity?

[fol. 48] A. That is not for the boom, that is for the workmen, that they know that they don't have to work with a bigger weight than three tons, has to be on it. That is international.

ROBERT ALLEN SIMONS—for Impleaded-Respondent.

Direct examination.

By Mr. Monigan:

The Court: See if we cannot clear this thing up. Do you know how these automatic cut-offs work, Mr. Simons?

The Witness: I have a general knowledge of how they work.

The Court: Well, can they be set to work under different loads?

The Witness: Absolutely.

The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?

The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.

The Court: Now, what is the name of the regulation to which you say prescribes the quantity of current at which the winch, the maximum quantity of the current, the minimum quantity of current at which the winch will cut off?

The Witness: I do not know the exact name of the regulation. It is a Maritime Commission regulation or administration, as it is now called. I know something about what the regulation states, that it will allow a maximum of three times the normal load current to run through the cut-off before it cuts off but no more. In other words, a cut-off cannot be set on any ship that comes under the Maritime Administration, so that the setting will allow

over three times the normal load current to pass through the circuit breaker.

Q. Is there any—apart from any government regulation—any prescribed standard of design which can be expressed in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch?

A. I don't know.

Cross examination.

By Mr. Cichanowicz:

Q. You have expressed an opinion about the setting of an overload cut-off on an electric winch. Would you tell us what kind of overload cut-off you were talking about?

A. Yes.

Q. What type was that?

A. An electric circuit-breaker.

Q. Was that a thermal unit?

A. That is a thermal unit.

Q. And that operates by building up heat, isn't that correct?

A. That is correct.

[fol. 50] Q. And when the heat reaches a certain point then the cut-off cuts off, isn't that right?

A. That is correct.

Q. Now, it does take time, does it not, for the heat to build up?

A. Well, naturally, anything would take time, of course.

Q. In other words, when the overload occurs it takes some time before the overload device cuts off?

A. That is correct.

Q. So that the time element enters into the point at which the set-off will be—rather the cut-off will be set?

A. That is correct.

Q. Are you familiar with overload cut-offs that are magnetically operated?

A. Well, I know that they are magnetically operated cut-offs. That is what a circuit-breaker is.

Q. And magnetic cut-off works differently than a thermal one, isn't that right?

A. That is correct. I think that's correct.

Q. Usually a magnetic cut-off is the type which you would call instantaneous cut-off?

A. That is correct.

Q. So that as soon as the overload occurs that turns off?

A. That's correct.

The Court: And is a magnetic cut-off—does that work through an induced secondary current as distinguished from a thermal cut-off working through an increase in resistance in the circuit?

The Witness: I believe so, yes.

Q. You have testified that the Maritime Administration has regulations which provide that the cut-off be set at three times the normal load, isn't that correct—for normal [fol. 51] load current?

A. Yes, that is maximum, by the way.

Q. You cannot go beyond that?

A. No.

WALTER J. BYRNE—for Impleaded-Respondent.

Direct examination.

By Mr. Monigan:

Q. Did you make any arithmetical computation predicated upon that position of the preventer in relation to the gear on the Fisser on January 2, 1954?

A. I did not make any specific calculations on that basis, no.

Q. Why did you not do so?

A. Because I felt that the arrangement was unrealistic

and that the end result without going through any computations could have been predicted without any question.

Q. And you say they could have been predicted. By that what do you mean?

A. Well, just because of the lead of the preventer in or about the plane of the boom and the topping lift, and where we have a lateral pull, obviously, you are going to get extreme stresses in the entire gear.

Q. And when you say extreme stresses by that what do you mean?

A. In the neighborhood of what Mr. Stewart has developed.

.

Cross examination.

By Mr. Brass:

Q. Didn't you testify on direct examination that the topping lift is or should be the strongest part of the system?

A. I said that the topping lift is normally the strongest part of the system but everything is relative. We are talking about stresses, not sizes. A five-eighths wire in one position could be, let us say, much stronger than an inch wire somewhere else, so that I do not think that I can segregate sizes.

Q. Well, where is the possibility of the greater stress?

A. It would vary with each condition.

Q. If the rigging was set up in a condition whereby the preventer was to the aft of the hatch as shown on this model, where would the greatest stress be?

A. For that example—

Q. If the preventer was set up to the aft of the hatch as shown on this model, where would the greatest stress be?

A. Well, there you are getting into the realm of—I don't happen to know the relative—I don't recall the relative stress between the topping lift and that preventer or the compressive stress in the boom which is opposite.

Q. Well—

A. I don't think it can be simplified purely from the standpoint that one of the things that you might—may I go on?

The Court: Go ahead.

The Witness: If I make this statement that under many conditions that the problem of failures in ships' cargo gear is with light drafts, it throws out a lot of thinking. I don't think you can take anything here and specify this is to this is to this. I can take a light draft and pull the gear down.

Q. If you place the preventer or any part of the gear in a certain position, is that right?

A. That is right, you can change the picture by placement.

.

[fol. 53] JOHN G. FOLEY—for Respondent in rebuttal.

Direct examination.

By Mr. Cichanowicz:

Q. Mr. Foley, are you familiar with electric winches that have an electro magnetic overload relay?

A. An electric magnetically actuated, yes. They are instantaneous type relays.

The Court: What do you mean by instantaneous type?

The Witness: When the current reaches the setting they go out. A thermo type is usually known as an inverse time limit relay.

The Court: So that by reason of the distinction you get an instantaneous shut-off when the electro magnetic field has been created.

The Witness: To the setting of the relay.

.

The Court: Objection sustained. Do you know what the maritime regulations are respecting this question?

The Witness: I do.

Q. What are they?

.

The Witness: For direct current motors under 50 horsepower, 250 per cent of full load current. If it is an instantaneous type relay, if it's a time limit relay it is 150 per cent.

The Court: Say that again slowly. 250 per cent—

[fol. 54] The Witness: Of the full load current of the motor when the relay is an instantaneous type relay.

The Court: And this was an instantaneous type we are talking about?

The Witness: That is correct.

The Court: In other words, it takes 250 per cent of the safe load.

The Witness: Of the full load current of the motor.

The Court: Before it shuts off.

The Witness: Before it trips, yes, and there are reasons for that.

The Court: Would you or would you not have to know the maximum load which was to be applied at the end of the cargo runner in order to determine at what setting you would fix the shut off device on your winch?

The Witness: That is done by the manufacturer, yes, your Honor. Given load it is set at 200, up to those capacities, and you see, it is 250 per cent of the motor current. That means that if the motor current is ten amperes it is 250 per cent of ten amperes. If it is 100 amperes it is 250 per cent of 100 amperes.

The Court: If the gear consisting of the topping lift boom and cargo runner are rated at say a three-ton safe load each, at what load should your winch be set to shut off automatically?

The Witness: The motor that matches the three-ton load and the speed has a certain—for a given voltage has a certain amperage, maximum amperage, and it is set—that is normal amperage now, normal full load, not over—[fol. 55] load, normal load amperage—it is set for two and a half times that amperage.

Now, that translates back to the efficiency of the machine to less at the runner. It is not the two and a half per cent load at the runner because you are losing through the gearing and so forth.

The Court: You mean two hundred and a half per cent.

The Witness: Two and a half times, and you have got—you cannot operate to a hundred per cent because you cannot move the load the hundred per cent.

The Court: For loss of efficiency factor differentiates between the six tons and the four.

The Witness: That plus the acceleration, the accelerating forces that are required you cannot move a three-ton load by applying three-ton to the runner. It will stay there. That is fundamental dynamics—mechanics, I should say.

Q. Mr. Foley, assuming that the electric motor has a rated load of three tons and the cut-off is set at approximately or a little better than six tons or a hundred per cent over the rated load—

A. It is not set on that basis, it is on a basis of 250 per cent of the motor's full load running current.

Q. Well, is not—

A. So that would not be six tons, that would be less than six tons at the runner.

The Court: You have been talking about this winch being set. Do you mean by that, Mr. Foley, that you manually adjust the load under which the device will cut in?

[fol. 56] The Witness: The devices as they come out they have a range, we will say, it is a hundred ampere relay will have a range from—that is normal current is a hundred amperes. They will have a range up to probably 300 amperes, so that at the factory they put full load on the motor with the controller and set the thing to trip. There is an ammeter in the circuit. They put it on a dynamometer, and when it reaches, they just screw the thing up until it is set for 250 and they leave it there.

The Court: And is that the way it stays during operations?

The Witness: During the life of the ship unless they have to repair the controller. When they take the ships in for overhaul they retest them.

[fol. 57]

**Appendix on Behalf of the Respondent-Impleaded
Appellant, No. 12,140 and Appellee in Nos. 12,138,
12,139—Filed April 27, 1957**

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JOHN H. CRUMADY, Libellant-Appellant,

—against—

**JOACHIM HENDRIK FISSE, Her engines, tackle, apparel, etc.
and JOACHIM HENDRIK FISSE and/or HENDRIK FISSE,
Respondent-Claimant-Appellee and Appellant,**

—against—

**NACIREMA OPERATING Co., Inc., Impleaded Respondent
Appellant and Appellee.**

TRANSCRIPT OF TESTIMONY (EXCERPTS)

**MANUEL COSTA, called as a witness on behalf of the re-
spondent-impleaded, having been previously sworn, testified
as follows:**

Direct examination.

By Mr. Monigan:

**Q. Can you show us on the model which is marked R-13
for identification—I guess it is now in evidence, but it
still bears the marking R-13 for identification—where on
[fol. 58] the model you caused the preventer to be placed
on the port boom?**

The Court: Step down and show it.

**The Witness: The preventer on the model was at least
in this position.**

**Mr. Monigan: The witness indicates on the model a point
at the most forward end of the piece of wood which extends**

on the port side of the vessel just athwartships from the mast block—I am sorry, with the block at the base of the mast.

The Court: Before you go any further, what about the question of this model being in evidence. Is it in evidence or only for identification?

Mr. Cichanowicz: I do not recall. If it is not in I will offer it.

The Clerk: It is for identification.

Mr. Brass: I am going to object to it. I don't mind it being used for certain purposes, but we have a model here as I pointed out yesterday—it has pad-eyes on this side, the starboard side to the fore of the vessel, and yet has no pad-eyes on the port side opposite the same position.

Furthermore, it would seem to me that this model does not disclose other vital apparatus or positions of pad-eyes that might have been disclosed had we an exact replica of the vessel itself.

Of course, I have no objection to its use, but my only objection of it going into evidence is that this model cannot constitute for the full purposes of all the testimony an exact replica of the vessel.

The Court: Of course, there are a lot of things missing, the scuppers are not there and a whole lot of appurtenances of the vessel are not showing, but it has been used by all parties at this litigation, and I am going to admit it in evidence as demonstrative evidence and it will be marked at this time as your exhibit, Mr. Monigan.

[fol. 59] (Model of ship marked Exhibit IR-5 in evidence.)

The Court: Wait a minute. Whose model is it?

Mr. Monigan: It is not mine, it is the respondent's. It should be R something, because I have considerable concern about some aspects of the vessel as represented on the model which are not—

The Court: How is it marked now?

Mr. Monigan: It is now R-13 for identification.

The Court: Then make it R-13 in evidence.

(Model of ship marked Exhibit R-13 in evidence.)

Q. I notice, Mr. Costa, that the lashing on the model, the preventer, you have it tied around a guy on the foremast. Is that the way it was tied on January 2, 1954?

Mr. Cichanowicz: I object to that. It is leading.

The Court: No, it is not leading. I will overrule the objection.

The Witness: Shall I answer now? The preventer was put in, tied to the pad-eye on the—it had a post from the railing of the ship to the deck and it was sort of a pad-eye on that post.

The Court: The pad-eye was on the post that supported the rail?

The Witness: Yes, and tied to a cleat, and the guy was also on this position.

The Court: When you say this position, do you mean similarly fastened or in the same position as the preventer?

The Witness: No, similar to the preventer.

Q. This model R-13, as I understand your testimony, does not show a pad-eye in the position of the preventer on January 2, 1954, is that correct?

A. It does not. I specified, if the Court remembers when I was here before, that I shifted—well, I was doing it here. I tried to tie it here to the railing of this model, but being [fol. 60] there was no place to secure it, I let it stay in the same position as it was this morning.

Q. Now, do you remember where in respect to the deck the pad-eye was to which the preventer was lashed on January 2, 1954?

A. Pad-eye was almost parallel with the heel block. It would be a foot aft.

The Court: What?

Mr. Monigan: Possibly a foot aft, I believe he said.

The Witness: Yes.

Q. And do you recall where the preventer—do you recall where the guy was placed on January 2, 1954?

A. The guy was placed I would say a foot away from the preventer.

Q. Can you demonstrate on the model the relative position for the guy on January 2, 1954?

A. Yes, I can. This position.

Mr. Monigan: The witness holds the shackle of the guy in a position on the model which is just opposite and to the port of the forward port corner of the No. 1 hatch coaming.

The Court: How far did you say the point of fastening of the guy was from the point of fastening of the preventer in feet?

The Witness: About a foot.

Q. And was there anything on the vessel on January 2, 1954, to which the guy could be attached in the position which you indicate on the model?

A. Yes, it was one of these posts that go from the railing to the deck, and had a hole about I would say an inch and a half in diameter, and we secured the guy with a shackle into this hole on this stanchion that was from the railing to the deck.

Q. Were there any other pad-eyes or shackles on the *Fisser* on January 2, 1954, which are not shown on the [fol. 61] model R-13?

A. Yes, sure. For instance now here on these shackles or pad-eyes as they show here—

Mr. Monigan: Indicating the small vertical piece of wood on the port side of the model.

The Witness: It don't show anything on these—on this position where the preventer should be, and the guy on this particular model it does not show anything.

Q. That there are no—

A. No pad-eyes.

Mr. Monigan: The witness refers to the fact that there is on the model no pad-eye displayed on the small vertical piece of wood which occupies the port side of the vessel from a point forward of the No. 1 hatch coaming to the after portion of the hatch coaming.

Q. Do you recall whether or not there were any pad-eyes or cleats or other deck gear on the port side forward of the vessel on January 2, 1954?

A. If there were any pad-eyes?

Q. Yes.

A. Yes. I recall there were pad-eyes on the vessel.

The Court: In that area?

The Witness: In that area.

Q. And as you examine the model are you able to observe any of those pad-eyes on the port side forward of the vessel except where they are attached to the guys?

A. Well, not here, not on this model, because they did not place any pad-eyes on this particular model. That is why when I testified previous to this I couldn't let the guy and the preventer secure like I do now because there is no place to secure it.

Q. In your experience as a long shoreman, Mr. Costa, have you had an opportunity to observe the pad-eyes, the location of pad-eyes and shackles on vessels of all types [fol. 62] which you have worked in the discharge and loading of cargo?

A. Yes, I had.

Q. On the basis of your observation of such vessels, are you able to tell us whether or not it is usual that the pad-eyes and shackles are the same on the port side of the vessel as are on the starboard side?

A. The same, there is no difference. A pad-eye in all vessels, to rig an up and down boom, a pad-eye is parallel with the heel of the boom pad-eye and the same way on either side, starboard side or port side.

Q. Are booms on vessels that you have observed used alternately, as Burton and up and down booms, depending upon the side of the craft which is moored to the bulkhead or the pier?

A. Yes, that is right.

The Court: Mr. Costa, were the guy and the preventer of the up and down boom secured at the point which you have illustrated on the model when you and the men first went aboard that day?

The Witness: When we first went aboard?

The Court: Were they already in that position?

The Witness: No.

The Court: Who put them there?

The Witness: We did.

The Court: I am referring back to your testimony of March 2nd, in which I understood you to say that at hatch No. 1 when you and the men came aboard the booms were already up and the preventer and the guy was attached.

Now, by whom were the preventer and the guy attached to the location which you pointed out?

The Witness: By the crew of the ship, I suppose, when we went aboard.

The Court: They were already in that position?

The Witness: No, in this position.

The Court: You put them in that position?

The Witness: They were in this position like it is here, like it was before.

[fol. 63] The Court: I am talking now about the position which you have just illustrated with the guy fastened about one foot from the preventer and both points of fastening being on the rail or on the stanchion of the rail at a point abeam of the forward end of the hatch. Did you fasten them there, your people?

The Witness: Yes, we did.

Q. Before the longshoremen put the guy and the preventer in the place which you have designated on the model R-13, and which you have testified about, do you recall the location of that preventer and guy?

A. Yes, I do.

Q. And was the guy and the preventer in the position from which you had it moved when you first came aboard the vessel?

A. Yes, they were.

Q. Now, can you indicate to us by the model where you recall the guy and the preventer were when you first came aboard the vessel on January 2, 1954, to begin work?

A. I can. The guy was more or less in this position here.

Mr. Monigan: The witness indicates the first of the three holes which are on the piece of verticle (sic) wood occupying the port side of the model. When I say first, I mean the first forward of the three holes.

Q. Do you recall where the preventer was when you first came aboard the *Fisser* on January 2, 1954?

A. The preventer was about this area more or less.

Mr. Monigan: The witness refers to the second of the three holes, or the middle of the three holes occupying the vertical piece of wood on the port side of the coaming—I am sorry, the port side of the vessel.

Q. Why did you move the guy, why did you have the guy and the preventer moved from the position which you [fol. 64] have indicated ~~was~~ their position when you came aboard the ship, to the position which you have indicated you caused them to be moved before your operations began?

A. Well, as a practical procedure on the ships, when we go on ships we usually find the booms up, then we have to trim the booms the way we are going to discharge the ship. We load, of course, on this particular ship we are not allowed to lower the booms. We were allowed to trim the booms either way we wanted. So in order to work we got to place the guy and the preventer in this position so you can have the right lead when you discharge a ship.

Mr. Monigan: The witness indicates a position for the guy, the same position which he had indicated as the position to which he had moved the guy before operations began.

The Witness: In other words, if I were to leave the preventer stay in this position.

Mr. Monigan: Indicating the middle hole on the vertical piece of wood on the port side of the model.

The Witness: When I started work this preventer would be useless, it would not be any good. It wouldn't hold the boom in the position that I wanted the boom to be, because by having it leaning aft and when the Burton boom takes the strength on both runners, this boom will swing toward the middle of the hatch by having her in this position here.

Mr. Monigan: Indicating the position in which the preventer was rigged when he first came aboard the vessel.

The Witness: By having her like we always do, by my practical experience it would not move, it stays in that position all the time.

The Court: And the purpose of placing it in the position in which you placed it was to overcome the pull in the direction of the center of the hatch, is that right?

[fol. 65] The Witness: That is correct.

The Court: To counteract the pull?

The Witness: Yes.

Q. Now, on January 2, 1954, are you certain that you had before you began the work, the preventer and the guy

in the position which you have demonstrated you had it moved to on the model?

A. Yes, I am certain of that place.

Q. Has your experience as a longshoreman indicated to you the desirable or the safe place to put guys and preventers on the discharge of cargo?

A. Yes, some practices in some ships because we have this boom say in this position way up here.

Mr. Monigan: Indicating the position of the boom closer to the mast than that indicated in the model.

The Court: With the boom making a smaller angle at the mast—with the mast.

Q. What is the effect of that?

A. Then when the boom is in a smaller degree, then we have to have either the guy or the preventer in this position so the boom won't jack-knife against the mast.

Q. But on January 2, 1954, did you have anything to do with the setting of the boom?

A. Yes—not the setting of the boom.

Q. So far as the topping lift is concerned?

A. No, we didn't touch that.

Q. And from your experience as a stevedore is there anything about the relationship to the location of the preventer with relation to the guy which is important in the discharge of cargo?

A. Well, we consider the guy and the preventer just as valuable on discharging the cargo. The reason why they make these is for the deckmen, when they rig the boom they usually pull on this. It has got four parts on it and the boom swings quicker. But as far as fastening this we put [fol. 66] just as much strength on the guy as we do the preventer. As a matter of fact, at times we put a little more strength on the guy so when we put the weight on the boom, the rope gives a little bit, and then the preventer takes over and there will be similar strength on the guy and the preventer.

The Court: Are both the guy and the preventer made of wire rope?

The Witness: The guy is made of a rope, coil rope.

The Court: Manila rope?

The Witness: Yes.

The Court: And the other is made of wire?

The Witness: Yes, the preventer is made of wire.

Q. Is all of the guy always made of manila rope or is there any portion of it which is sometimes made of manila rope?

A. The pennant.

Q. And by the pennant do you indicate that portion of the guy which is between the head of the boom and the ship?

A. That's right.

The Court: Was that the case on this vessel that day?

The Witness: Yes, it was the case. The pennant on this ship was made of wire. The pennant on the guy was made of wire.

Mr. Brass: I think the photograph substantially indicates that it shows the guys.

Cross examination.

By Mr. Cichanowicz:

Q. Mr. Costa, when you came aboard the ship you were told not to move the booms; is that correct?

A. Not to raise or lower the booms.

Q. The only instructions you were given were not to raise or lower the—

[fol. 67] Mr. Monigan: If your Honor please, I think again we are going beyond the scope of the direct examination of this witness. It is addressed to the testimony of the witness at earlier appearances that he made in the matter.

The Court: I will overrule the objection, because my recollection is that he said on direct that he trimmed the boom and changed the position of the guy and the preventer, and then he discussed the propriety of different positions depending upon the angles formed by the boom with the mast. I will permit the question.

The Witness: Given by the Mate not to lower it or raise the boom.

The Court: And you could trim the boom without raising or lowering it, couldn't you?

The Witness: Yes.

By the Court:

While you are examining the record—Mr. Costa, do you remember when you were here on the stand back on the 2nd of March of this year?

The Witness: I remember.

The Court: Do you recall whether you illustrated then what you have illustrated today respecting the position of the preventer and the guy of the up and down boom?

The Witness: I do.

The Court: On the model.

The Witness: The same way as I did today.

The Court: You did it then the same way as you did it today, that is your recollection?

The Witness: Yes.

[fol. 68]

Appellee's Appendix in No. 12,139—Filed May 23, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

—v.—

JOHN H. CRUMADY (Libellant), Appellant in No. 12,138,

—v.—

JOACHIM HENDRIK FISSE, Her Engines, Tackle, Apparel, etc.
and JOACHIM HENDRIK FISSE and/or HENDRIK FISSE
(Respondent-Claimant), Appellant in No. 12,139,

—v.—

NACIREMA OPERATING Co., INC. (Impleaded Respondent).

TRANSCRIPT OF TESTIMONY (EXCERPTS)

DR. HERMAN LOWMAN.

Direct examination.

Q. What are your terminal findings? When did you see him last and what were your terminal findings?

A. February 29, 1956, in my office. At that time patient walked with a marked left sided limp with a cane. Without a cane he cannot walk more than several feet. He walks with the left foot placed flatly on the floor with no spring. The back brace that he wears was removed and this showed mark(ed) wear. On standing erect it was noted that there was a moderate right dorso lumbar scoliosis with obvious spasm grossly and on palpation of the left lumbar muscles.

There was marked flattening of the normal lumbar curve. Forward flexion of the trunk was possible until the fingertips were about twelve inches from the floor. In performing this motion he does it slowly and in apparent pain. There is incomplete reversal of the lumbar spine in doing this. He hyper extends his spine slowly with about a 5-degree loss. There is about 5 to 10 degrees loss of right

and left lateral flexion of the trunk. He also performs these motions slowly and painfully.

The left side of the pelvis appears higher when he stands. In a sitting position there is a moderately positive Lewin test bilaterally.

The Court: What is that?

The Witness: The Lewin test is performed with the patient sitting with the feet hanging over the edge of the examining table and the examiner passively extends his knee, and in case of spasm or any disorder of the back, [fol. 69] the patient limits the extension of the knee because of pain.

He complains of pain of the entire lower spine in performing this test. In the supine position, straight leg raising is restricted on the right leg for about 30 to 40 degrees and on the left leg for 40 degrees.

With his knees flexed there is further flexion possible in the hips, but he still complains of pains in the entire low back area.

There is a moderate loss of abduction of both hips, slightly greater on the left. There is a moderate loss of inversion and eversion of both hips, slightly greater on the left.

He complains of some tenderness in the lower abdomen on both sides. There is also marked tenderness on pressure over the symphysis pubis. He complains of pains in this area on lateral compression of both sides of the pelvis.

Leg measurements are equal. In lying supine it is noted that he holds the left side of the pelvis higher than the right. The left calf measures three-quarters of an inch smaller than the right in circumference.

The Court: What was that again?

The Witness: The left calf. The left ankle measures one-half inch greater in circumference than the right. There is a healed puckered scar still visible on the lateral aspect of the ankle. The left foot is held in slight valgus position. There is marked restriction of motion in the midtarsal joints of the left foot. There is a 15-degree loss of dorsal and 15 degrees loss of plantar flexion of the left ankle.

There is some residual stiffness of the toes of the left foot. He complains of some tenderness in the upper lateral aspect of the right calf.

In the prone position, the previously mentioned spasm is again noted in the left lumbar muscle group. There is [fol. 70] marked tenderness in this area. In addition there is tenderness of the right lumbar muscle group and over both sacroiliac areas. He is likewise tender over the lumbosacral region of the spine.

The Ely-Nachlas test are moderately positive. Loss of rotation of both hips is easily demonstrable in this position.

Q. What was your conclusion?

A. Well, it is my feeling and still my feeling, as it has been in the past year, that this patient is totally disabled, permanently. I feel his condition is stationary in respect to his spine and pelvis. I note here that it should be noted that he has increased loss of motion in both hips. I feel this may indicate a progression of disability in both hip joints. I feel his left ankle is progressing poorly and that he requires an ankle fusion to diminish his pain and possibly help his gait.

CAPTAIN PETER PETERS.

Direct examination.

Q. Wasn't the burden at which the safety device would shut off the winch—being six tons according to your testimony—twice as great as the safe working capacity of the boom?

The Witness: Yes, six or more.

Q. And wasn't the safe or the burden at which the safety device on the winch would shut off twice as great as the safe working load of the runner?

A. Yes.

[fol. 71] Q. And wasn't the burden at which the safety device of the winch would shut off twice as great as the safe working load of the topping lift?

A. Certainly twice. It is too technical.

ROBERT ALLEN SIMONS.

Direct examination.

Q. And is there any factor prescribed for safe practice in the function of the electric cut-off device in electric winches so far as you are aware?

Mr. Cichanowicz: This is repetitious. I believe it has been covered.

[fol. 72] The Court: Was that not what he said three times?

Mr. Monigan: I believe that is related to the amount of current which goes through the winch rather than the load.

The Court: You mean by government authority?

Mr. Monigan: In relation—

The Court: Prescribed by government authority.

Mr. Monigan: By any authority that he knows.

The Court: Is there or is there not? The objection is overruled.

The Witness: Well, yes, as far as I have said in controlling the current you are controlling the load.

The Court: Will you enlighten me a little bit on that. You say in controlling the current you are controlling the load. What actuates this cut-off device, an excess of current?

The Witness: To the motor, that is correct.

The Court: And that is measured in amperes, is it?

The Witness: That is correct.

The Court: How do you relate the excess of current to be an excess of current to an excessive load?

The Witness: The greater the current applied to a motor, and therefore applied to the winch, the more horsepower and torque the motor will have and, therefore, the more pull on the load or on the hoist wire. In other words, the greater the current that goes through that motor, the more power you are supplying to the motor, and the more power you are going to get out of that motor, and the more lift from the motor.

The Court: What ultimately shuts the current off is the resistance to that horsepower of the motor, is it not, to be found in the load which is being hoisted?

[fol. 73] The Witness: That is correct.

The Court: So that if you try to pull the bottom of the ocean up you would reach a point where your motor would shut off if the shut off device was functioning?

The Witness: That is correct.

Q. Is there a standard procedure or standard practice so far as the integration of a winch which is capable, which has a cut-off at six tons with gear which is designed to bear a load of three tons in its component parts?

A. I don't know if there is a set printed standard or a set standard, if you mean by that a printed standard.

Q. Is there any sound engineering practice of which you are aware in the design of ship's cargo equipment which considers the integration of those factors recited to you?

A. Yes.

Q. Is there a prescribed method of design of such factors?

A. Yes, according to the design departments I have been in, we are always considering it good practice to set or to have the cut-off shut the winch off at around fifty per cent or less of the load.

Q. And why is that safe practice?

A. It is safe because if a rig is designed, we will say, for three tons and you apply six tons on the end of a hook because you were doubling the load, you are not necessarily just doubling the load in the topping lift twice—I mean doubling the load in the topping lift, you might be making it ten times with the vang or preventer in certain positions. Therefore, a rig designed for three tons should never be operated lifting six tons.

Cross examination.

[fol. 74] Q. Did I understand you to say that it is not safe practice to have a runner with a safe working load of three ton, a boom with a safe working load of three-ton, a topping lift with a safe working load of three-ton, and a winch which has a shut-off device of the current at six-ton or better?

A. I did not say that.

Q. What did you say?

A. I said that it is not safe practice to have a rig that was designed for three tons working load and of the winch with a cut-off set at six tons so that you could apply six tons load to the hoist before the winch would cut off because that would be doubling the load for which the rig was designed for.

.

WALTER J. BYRNE.

.

[fol. 75] Cross examination.

Q. On what do you base your familiarity with the end result of cut-offs on electric winches?

A. Well, if you have three-ton gear and a three-ton winch and due to cut-offs in back, you allow, let us say, a hundred per cent overload to be developed, then I think from my point of view as a safety man you are taking away a governor. You are taking away something which is built in for the protection of the gear and personnel.

[fol. 76]

Libellant's Supplemental Appendix—Filed June 21, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN H. CRUMADY (Libellant), Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSE, Her Engines, Tackle, Apparel,
etc. and JOACHIM HENDRIK FISSE and/or HENDRIK
FISSE (Respondent-Claimant), Appellant in No. 12,139,

v.

NACIREMA OPERATING Co., INC. (Impleaded Respondent):

TRANSCRIPT OF TESTIMONY (EXCERPTS)

HERMANN BUSS, called and sworn on behalf of the respon-
dent, testified as follows:

Direct examination.

By Mr. Cichanowicz:

.

Q. And did you inspect the after end of the second piece of timber?

A. Then I inspected it.

Q. And what did you see when you inspected that after end of the timber?

A. That there was a dent at the upper part of the after end at the timber.

Q. About how long was this dent?

A. It was about a foot.

.

Q. Now, did you also run the winch? [after the accident]

A. Yes, sir.

Q. When was it; the first time, the second or the third time?

A. That was the first time.

Q. And what did you do before you ran the winch, if anything?

A. I just wanted to start the winch. I wanted to start the winch. To do that, I had to go to the fore end of the mast, the locker end of the mast.

[fol. 77] Q. Why did you go there?

Mr. Monigan: Objected to; if your Honor pleases. A conclusion on the part of the witness. What purpose was served in that respect is purely a conclusion.

The Court: I overrule the objection. Why did you have to go there?

The Witness: To start the engine. The starter is in this locker of the mast.

The Court: The starter is in what?

The Witness: In the locker of the mast.

The Court: All right.

Q. What kind of starter is that in the mast?

A. That is an electric starter.

The Court: A switch?

The Witness: No, sir. That's an electric starter. That's the same they use in America, the same word for it too. I can show you by a picture to make it understandable, how a thing like that works.

The Court: Have you got one?

The Witness: No. A couple of rheostats it is; a big rheostat.

The Court: That's what you call a starter?

The Witness: That's a starter.

The Court: And I think we all understand that a rheostat regulates the degree of current that is applied. All right.

Q. Now, after you did that, then you went over to the winch?

NOTE—The page numbers of this Supplemental Appendix continue on from the end of "Appellee's Appendix in No. 12,139."

A. Then I went over to the winch.

Q. And what did you do?

A. Just pushed the lever ahead and back to show him that things are working properly.

[fol. 78] The Court: Now, captain, tell me this for my information. When a winch operates or a man uses the winch, does he have to do anything with the rheostat?

The Witness: Nothing at all. He has only this lever, to push it ahead for lifting. For stopping, he has up and down. For lowering with a weight on it, he has to put it a little bit back. If there is no weight, he has to push it farther back. And that's all he has to do.

The Court: Now, before this boom fell, it was being used, wasn't it?

The Witness: The whole morning.

The Court: Why was it necessary for you to do anything to the rheostat in the locker at the base of the mast?

The Witness: This main switch was shut off by getting too much current. It is switching out at six tons, and then it jams out, and then you have to push it again and start the whole business again.

The Court: So that the shutting-off device, the operation of the shutting-off device, requires the replacement or readjustment of the rheostat, is that correct?

The Witness: Yes, sir.

Q. Do you know at what point the cut-off or overload device was set?

A. In our boat, at a hundred per cent plus.

Q. Plus what?

The Court: A hundred per cent of what?

The Witness: Above the ordinary amount the motor takes.

The Court: In other words, twice the capacity?

The Witness: Twice the capacity.

[fol. 79] Q. Well, after the accident, Mr. Buss, did you go into the mast house locker or the mast table locker? Did you go in?

A. I can't go in. That is a locker that big, about.

Q. You went to the mast block?

A. I went that afternoon when Captain Axiodes and the others that were on board, they wanted me that I start the winch, Mr.—I forget his name.

The Court: Grundvig?

The Witness: Grundvig. And so I had to go to the mast locker and when I wanted to start that winch I found out that the button was jammed out of this cutting shut-off device.

The Court: And can you throw out the interrupting device by hand?

The Witness: No. Then we have to unscrew the whole stuff, you see. You use about a quarter of an hour's work.

The Court: And if there is no tension on the wire around the drum of the winch, is it possible for the interrupting device to go out?

The Witness: No.

Q. Captain, when you went to the mast, the locker and mast table in the afternoon at about 3 o'clock on January 2nd, what did you find with respect to the overload device?

A. I first looked at my switch at the winch, if it was in the correct direction for starting, and then I started the hand wheel and the hand wheel slipped back, and so I see that there was no current on it. Then I looked over at the powering device there and switched it in.

The Court: Was it out?

[fol. 80] The Witness: It was out. If there is no current this big hand wheel—

The Court: Show me the hand wheel.

The Witness: Here.

The Court: That is on the rheostat.

The Witness: If there is no current flowing. Here is the little electric coil with a hook which holds it in the end position and as long as there is no current flowing it jumps back, then I found it out and then I looked to see

on this locker mounted on the side. Then you just have a little black button that is looping out and you push it in.

Q. You say that this could not be turned off by anybody else at any time?

A. No.

The Court: I can understand things better from seeing them than from hearing them described. While he is getting that tell me this: When you at 3 or 3:30 tried this winch and found this interrupting device was out—

The Witness: I pushed it in with the finger.

The Court: And when you pushed it back in were you able to operate the winch?

The Witness: Then I tried the handle again, you see, and then it worked. From the forepart of the mast you cannot hear if the winch is working but if it stays there, the big hand wheel, then it shows that the winch is working full speed.

[fol. 81] ISAAC STEWART, called as a witness in behalf of the respondent, having been previously sworn, testified as follows:

Cross examination.

By Mr. Morgan:

Q. * * * In order for your calculations to have been made, was it necessary for you to make an assumption as to the amount of strain that was on the cargo runner?

A. Oh, yes.

Q. Your conclusion was based upon the hypothesis that there was a three-ton strain on the cargo runner, is that correct?

A. It was based upon the fact that there was a three-ton rated boom and therefore I used that.

Q. If in fact there was not a three-ton strain on the cargo runner your calculations would necessarily be different, would they not?

A. They would be modified, yes.

Q. I believe that you testified that if the position of the cargo runner to the sling were different from your assumptions in that respect your calculations would likewise vary, isn't that so?

A. That is correct.

Q. Are there any assumptions in the hypothesis which you were given which are not represented on IR-4 for identification in those drawings?

A. Yes, I do not indicate on these drawings the loading conditions that were used in connection with the calculations.

Q. That is the weight on the cargo runner?

A. That is right.

Q. What else does IR-4 fail to disclose other than that? [fol. 82] A. I don't have the vertical height of the mast marked on here.

Q. What assumption did you make in respect to the vertical height of the mast?

A. I didn't give that in the course of my calculations. I am sorry, I misinterpreted your question. I did not use that in the course of my calculations.

Q. You did not consider the height of the mast for your calculations?

A. No, I did not use them.

Q. Are there any items of assumption which you made in making your calculation which are not represented on IR-4 for identification, except the weight on the cargo runner which you just mentioned?

A. Yes, I made an assumption of the stress due to the boom and rigging which is marked on the board as gear, assumed stress of a thousand pounds.

Q. That is the total weight of the boom and gear of a thousand pounds which you made?

A. No, no, the stress created by the weight of the boom and gear in the topping lift cable.

Q. Your thousand pound assumption was not weight of gear?

A. No, it is a stress.

Q. Stress resultant from the weight of gear?

A. That's right.

Q. What assumption did you make in respect to the weight of the gear itself?

A. Well, I did not make any assumption regarding the weight of it. I just took a value of a thousand which is negligible, and just put it in to indicate that I did not overlook that.

By Mr. Brass:

Q. Does the safe working load of a wire rope decrease with heavy usage?

[fol. 83] A. If wires are broken or damaged within the rope then it will reduce once they exceed the specified number. In every one of these instances the ultimate strength of the rope is affected.

Q. Does the safe working load of a wire rope decrease with the manner in which it is exposed to weather conditions?

A. I will have to answer that the same way. If the wires are broken it is removed from service, the ultimate strength will be decreased.

Q. So that the only way you can determine whether or not a wire has a lesser safe working load than when it was new is by determining whether or not any of the wires are broken?

A. That is correct.

Q. And how do you determine while the rope is in use whether or not there are any wires in the interior of the rope that are broken?

A. The wires on the exterior are the ones that break.

Q. And the wires on the interior do not break at all?

A. Generally they do not, the exterior wires being subject to the greater forces are the ones that are broken first.

The Court: May I interrupt you a moment, Mr. Brass? While we are still on this safe working load, did I under-

stand you to say that the safe working load of a wire rope is one-fifth of its tensile strength?

The Witness: Breaking load, yes; that is, a new rope.

The Court: Now as the deterioration increases in the wire rope the breaking load decreases, does it not?

The Witness: That is right.

[fol. 84] MANUEL COSTA, called as a witness on behalf of the respondent-impealed, having been previously sworn, testified as follows:

Direct examination.

By Mr. Monigan:

Q. Do you recall on January 2, 1954 what if anything you did with respect to—you did or had done at your direction with respect to the preventer on the port boom of the Fisser?

The Witness: I do.

Q. Can you show us on the model which is marked R-13 for identification—I guess it is now in evidence, but it still bears the marking R-13 for identification—where on the model you caused the preventer to be placed on the port boom?

The Court: Step down and show it.

The Witness: The preventer on the model was at least in this position.

Mr. Monigan: The witness indicates on the model a point at the most forward end of the piece of wood which extends on the port side of the vessel just athwartships from the mast block—I am sorry, with the block at the base of the mast.

Q. I notice, Mr. Costa, that the lashing on the model,

the preventer, you have it tied around a guy on the foremast. Is that the way it was tied on January 2, 1954?

Mr. Cichanowicz: I object to that. It is leading.

The Court: No, it is not leading. I will overrule the objection.

The Witness: Shall I answer now? The preventer was put in, tied to the pad-eye on the—it had a post from the [fol. 85] railing of the ship to the deck and it was sort of pad-eye on that post.

The Court: The pad-eye was on the post that supported the rail?

The Witness: Yes, and tied to a cleat, and the guy was also on this position.

The Court: When you say this position, do you mean similarly fastened or in the same position as the preventer?

The Witness: No, similar to the preventer.

Q. This model R-13, as I understand your testimony, does not show a pad-eye in the position of the preventer on January 2, 1954, is that correct?

A. It does not. I specified, if the Court remembers when I was here before, that I shifted—well, I was doing it here. I tried to tie it here to the railing of this model, but being there was no place to secure it, I let it stay in the same position as it was this morning.

Q. Now, do you remember where in respect to the deck the pad-eye was to which the preventer was lashed on January 2, 1954?

A. Pad-eye was almost parallel with the heel block. It would be a foot aft.

The Court: What?

Mr. Monigan: Possibly a foot aft, I believe he said.

The Witness: Yes.

Q. And do you recall where the preventer—do you recall where the guy was placed on January 2, 1954?

A. The guy was placed I would say a foot away from the preventer.

Q. Can you demonstrate on the model the relative position for the guy on January 2, 1954?

A. Yes, I can. This position.

[fol. 86] Mr. Monigan: The witness holds the shackle of the guy in a position on the model which is just opposite and to the port of the forward port corner of the No. 1 hatch coaming.

The Court: How far did you say the point of fastening of the guy was from the point of fastening of the preventer in feet?

The Witness: About a foot.

Q. And was there anything on the vessel on January 2, 1954, to which the guy could be attached in the position which you indicate on the model?

A. Yes, it was one of these posts that go from the railing to the deck, and had a hole about I would say an inch and a half in diameter, and we secured the guy with a shackle to this hole on this stanchion that was from the railing to the deck.

Q. Were there any other pad-eyes or shackles on the Fisser on January 2, 1954, which are not shown on the model R-13?

A. Yes, sure. For instance now here on these shackles or pad-eyes as they show here—

Mr. Monigan: Indicating the small vertical piece of wood on the port side of the model.

ROBERT ALLEN SIMONS, called as a witness in behalf of the Respondent-Impleaded, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Monigan:

Q. Where do you live, Mr. Simons?

A. 332 Maplewood Drive, Paramus, New Jersey.

Q. What is your business or profession?

A. I am head of the scientific section at M. Rosenblatt & Son, Naval Architects and Marine Engineers.

[fol. 87] Q. Where is M. Rosenblatt & Son located?

A. 111 Broadway, Manhattan.

Q. And what education have you had?

A. Bachelor of Science in naval architecture and marine engineering from the University of Michigan.

Q. What year did you graduate?

A. Spring of 1948.

Q. And since the spring of 1948 what has been your profession or occupation?

A. I have been an engineer in various shipyards, a merchant seaman on board a tanker, a designer of various types of vessels, and all types or various types of cargo handling systems.

Q. Have you ever had occasion to design a topping lift which is in two parts and which comprises five-eighths inch diameter galvanized mild plough steel wire rope to be combined with a cargo runner of seven-eighths inch diameter?

A. Definitely not.

Mr. Cichanowicz: I object to that. I think this has absolutely no relation to this vessel. This is very general testimony. There is no showing here that that is a matter which is pertinent.

The Court: He will relate it more specifically I think to all other types of vessels. I will overrule the objection.

The Witness: I have some figures on the size of topping lifts here. Well, your question was whether you—

The Court: You say, Mr. Simons, that you have never designed a topping lift which was less in diameter than the cargo runner?

The Witness: That is correct.

Q. And why is that?

[fol. 88] A. Because the number of parts would be too great in the topping lift to make a clean cut in an efficient design, the more parts you have in a topping lift the less efficient the rig is. Therefore you have to increase the size of your wire rope in order to increase the efficiency of the topping lift system.

Q. In your experience, is it standard practice to design

a two-part topping lift of five-eighths inch diameter wire to be used with seven-eighths inch diameter wire?

A. Not in my experience.

Mr. Cichanowicz: Is this referring to German vessels or is this referring to American ships?

The Witness: It refers only to the—

Mr. Cichanowicz: If it is referring to this type of vessel or other types of vessels—there are various types of vessels.

The Court: The objection will be overruled.

Q. Why is that not standard practice in your opinion?

A. Because—

The Court: Just a minute, Mr. Monigan. You say standard practice in his opinion. Is that a matter of opinion or a matter of fact?

Mr. Monigan: Suppose I reframe the question.

Q. Do you know, Mr. Simons, why that is not standard practice?

A. Yes. The reason for that is that you would need more parts or more numbers of a greater number of wires in the topping lift to make up for the lack of size in the wire, and, therefore, more sheaves in the blocks, and you have less efficiency in the rig because there is more friction in the sheaves.

Q. And in order for it to be standard practice to have a smaller diameter of wire comprising a topping lift with a larger diameter cargo runner wire is that it must be done with more parts of the topping lift?

[fol. 89] A. Yes, that is correct.

Q. So that a two-part topping lift of a five-eighths inch diameter is not standard practice in relation to a seven-eighths inch cargo runner, is that correct?

A. That is correct in my experience.

The Court: When you say two-part topping lift, does this model which is before us exemplify a two-part topping lift?

The Witness: That is correct.

The Court: And that is because there are two wires

running horizontally from the masthead to the boom head, right?

The Witness: That is correct.

Q. Have you had any experience so far as the automatic cut-off device in electric winches is concerned?

A. Yes.

Mr. Cichanowicz: I object to that. This man says he has no experience with electric winches.

The Court: That was my understanding.

Mr. Monigan: I think the witness was misunderstood. I just asked him this question to which he responded yes.

Q. What has been the nature of your experience in respect of automatic cut-offs on electric winches?

A. Well, in the design and surveying on board ship we have had to design rigs with innumerable electric winches, and I personally have never specified what the cut-off on a winch should be, but I have learned through experience what they generally set the cut-off on winches at.

Q. That is electric winches?

A. Yes.

Q. So far as you are aware, is there any standard practice in respect of the design of automatic cut-offs in electric [fol. 90] winches so far as the time at which the automatic cut-off device will operate?

A. Well, generally speaking in the field, I have found, and I have talked with many winchmen in the field, and I have talked to engineers in my own scientific section and other shipyards, and it all indicates that the cut-off should be around fifty per cent or less on a winch. I have never heard of a hundred per cent.

Mr. Cichanowicz: I move to strike out this testimony. It is hearsay.

The Court: Why is it not (sic) hearsay?

Mr. Cichanowicz: He said he had talked to engineers, he had talked to this person and that person. He had heard that this is what it is. It is not based upon his own experience or his knowledge. It is based upon something else that someone told him.

The Court: How about his particular experience in the field of winch design operation and function?

Mr. Cichanowicz: He testified that as far as that was concerned he did not have any particular knowledge or experience. This was based upon things that he got from other people.

The Court: Yes, I am going to sustain the objection. I am going to grant your motion to strike out. You may approach it in a different way, Mr. Monigan.

Q. What has been your experience so far as the knowledge of the existence of automatic cut-offs in electric winches?

A. Only what I have learned talking to the men that sell winches; the men that design the electrical circuits for winches in the engineering field.

Q. In the course of your work in designing and working as a naval architect, have you had occasion to rely upon the information with respect to automatic cut-offs in electric [fol. 91] winches that you have learned by your experience and the discussions which you have told us about?

A. Yes.

Q. Is there a standard practice so far as you know prescribing an automatic cut-off on electric winches?

A. Well, it is generally around fifty per cent overload and the winch cuts out.

Mr. Cichanowicz: I object again. This is just a method of getting around the other.

The Court: The unfinished answer will be stricken.

Mr. Cichanowicz: The other objection—

The Court: See if we cannot clear this thing up. Do you know how these automatic cut-offs work, Mr. Simons?

The Witness: I have a general knowledge of how they work.

The Court: Well, can they be set to work under different loads?

The Witness: Absolutely.

The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?

The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.

The Court: But that setting is a matter that can be controlled by the person who is in control of the winch at the particular moment, is that right?

The Witness: I know of no case where that has occurred. It is the electrician that sets the cut-offs when the winch [fol. 92] is installed, and if any change is made in it, the electrician of the ship or some competent electrician has to make the change in the cut-off.

The Court: I do not word it accurately. In other words, it may be changed by ship's personnel if he is competent as an electrician?

The Witness: Yes.

WALTER J. BYRNE, called as a witness in behalf of the respondent-Impleaded, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Monigan:

Q. Now, based upon the hypothesis that the preventer was located in a different position from that assumed in the hypothesis given to Mr. Stewart, did you make any calculations?

A. I did.

Q. And in those calculations what position did you assume for the existence of the preventer?

A. I led the preventer back opposite the heel of the boom.

Q. And were you present when Mr. Costa testified yesterday?

A. That is correct.

Q. Did you observe the position of the preventer which

he indicated it occupied before discharge and he placed the place on the model where that preventer was located?

A. Yes, from a seat back there I did.

Q. Have you prepared a diagram based upon that assumed location of the preventer along with the remaining rig?

[fol. 93] A. I have.

Q. What computation of forces did you arrive at on the several gear comprising the topping lift cargo runner and sling?

A. On the basis of the preventer lead back opposite the heel block I calculated the topping lift stress to be 8400 pounds.

Q. Do you have any opinion based upon your experience as a stevedore safety consultant of whether or not a location of the preventer in that assumed position with respect to the rest of the rig was safe or unsafe?

A. It was safe, and in this instance in my opinion it was all the more reason to be put back there because of the size of the topping lift.

Q. What effect would the size of the topping lift have upon the desirability of the location of the preventer as indicated by Mr. Costa?

A. Well, my experience is that a topping lift relatively speaking with the other parts of the gear is usually the strongest part of the whole system, and in there are certain situations where if the boom were placed in a certain position and with the other factors involved, that it might be advisable or indicated to make a slightly different type of preventer lead. But in this case where the topping lift is somewhat limited in its strength, the best possible way to strengthen that topping lift is to get some work and help out of the preventer which is led back to the heel which is in this instance it actually does. It helps the topping lift.

The Court: In other words, the compensation for any inadequacy of the topping lift cross section.

The Witness: That is correct.

Q. Based upon the assumed location of the preventer which was testified to by Mr. Costa, have you any opinion

concerning the cause of the parting of the topping lift on January 2, 1954?

[fol. 94] A. Based upon—

The Court: Let us answer that yes or no first.

The Witness: Yes.

Q. What is that opinion?

A. Based upon my calculations it is my opinion that the topping lift wire must have been defective.

Q. Do you have with you your calculations which you have made on the basis of the hypothesis of the location of the preventer as testified to by Mr. Costa?

A. I do.

Q. In the course of the preparation of those data did you make any assumption concerning the location of the boom in relation to the center line of the ship?

A. I located the heel of the boom two-foot off center and I located the head of the boom, if you drop a plumb line, two feet off the outboard of the coaming and along the center of the hatch.

Q. And did such calculations materially differ if you have an assumed location for the head of the boom of five feet from the center line?

A. The head of the boom?

Q. I am sorry, the back of the boom.

A. In this instance with this you might say it (sic) a complicated vector angle problem. There are certain things which compensate for each other and it would be very little differential in the end result with that difference in the location of the heel of the boom off center.

Q. To your analyses that you have testified about, do they contain both assumed locations for the boom?

A. I do not have both.

Q. The one that you have is predicated upon what location?

A. A two-foot off center—off the center line of the ship for the heel of the boom.

[fol. 95] The Court: You have two cargo booms on the same mast to serve the same hatch. Is it usual—unusual that each heel is off center slightly?

The Witness: Yes.

Mr. Monigan: I offer these analyses prepared by Mr. Byrne. Perhaps it could be admitted on the same basis that the other diagrams on the vessel's case were submitted.

The Court: How about that?

Mr. Cichanowicz: Yes.

The Court: It will be marked; subject of course, to explanation on cross-examination.

(Analyses marked Exhibit IR-8.)

The Court: Mr. Byrne, will you give me as succinctly as you can the chain of reasoning which brings you to the conclusion that the topping lift, in the case with which we are here concerned, must have been defective and that was the cause of the falling of the boom.

The Witness: Well, your Honor, in the analysis as used in the hypothetical problem originally as set forth by counsel and as analyzed by Mr. Stewart and making one change the leading back of the preventer to a position opposite the heel block, the entire stress picture changes. The end result for the topping lift comes out at the safe working load of the topping lift which is—and also far below the breaking strain, and for that reason I cannot come to any other conclusion than the fact that the wire must have been defective.

The Court: In reaching that conclusion, Mr. Byrne, have you taken into consideration the specific load at the sling?

The Witness: Yes.

[fol. 96] The Court: Upon what facts do you—

The Witness: I predicated the pull again on what I have read, counsel set up a hypothetical example of a three-ton pull, and I used that three-ton pull in the determination.

The Court: So that I, who am a landlubber, can understand all this marine—I was going to say jargon, but let us say terminology—when you say a three-ton pull, are you assuming that there was a load of three tons on the sling?

The Witness: Yes, a load—a pull of three tons of cargo runner.

The Court: All right. Of course, if that pull on the cargo runner was greater than three tons would your

opinion be different, if as a matter of fact that pull on the cargo runner, was greater than three tons?

The Witness: If the pull on the cargo runner was greater than three tons everything else would change, that is correct.

Q. What in your opinion is the effect of a hundred per cent overload on a cargo runner in connection with gear which has a three-ton capacity safe working load?

The Court: Is there any objection?

Mr. Cichanowicz: I object to that question. I object to the form of the question, the overload on the gear. I do not know what he is talking about, frankly. Is he talking about—

The Court: By gear, I take it you mean the cargo runner?

Mr. Monigan: The cargo runner and the remaining wire components of the freight.

The Court: Is that satisfactory to you?

[fol. 97] Mr. Cichanowicz: Yes.

The Court: Have you the question?

The Witness: The effect.

The Court: Yes, of a hundred per cent overload on gear having a safe working load of three-ton.

The Witness: It could be drastic.

Q. Why do you say that?

A. Well, that leaves open the opportunity of going beyond the limits of the gear. In other words, you might think of it as a governor or a safety valve that is missing. If you allow a hundred per cent overload to be applied, that is why.

Cross examination.

By Mr. Cichanowicz:

Q. Mr. Byrne, what is the factor of safety on a runner?

A. Five.

Q. Five what?

A. In order to determine the safe working load you divide the breaking strength by five.

Q. In other words, the safety—the safe working load—

A. Is one-fifth.

Q. And if you say it is a hundred per cent over the safe working load it is a drastic condition. Is that what you are testifying to now?

A. Yes.

Q. In other words, you say it is drastic even though the safe working load is one-fifth of the breaking load, is that right?

A. That is correct. I am a safety engineer. One pound over the safe working load in my opinion is bad.

[fol. 98] The Court: While you are thinking of the form of your question, let me ask this question: As I understand it, this safe working load is what its name implies, namely, a limitation on the recommended load to which a member of the gear or unit of the gear should be subjected so as to afford a maximum safety tolerance or cushion.

The Witness: Yes, in order to take—also take into account deficiencies, things of that kind, which might occur.

The Court: If you have a given breaking strength of a wire and you have computed the safe working load of that wire as one-fifth of that breaking strength, if by reason of the condition of the wire the breaking strength is reduced, is the safe working load proportionately reduced? Do you understand my question?

The Witness: I do, your Honor, and of course, there again it is from a practical aspect. If the breaking strength is substantially reduced due to wear or due to other factors, obviously the same working load has to be reduced.

I mean, it would be inconceivable to think otherwise, that if the wire had deteriorated to the extent that the breaking strain has been weakened, it would be foolhardy to continue the original one-fifth of sound wire breaking strain. So I can only—that is why I could not answer this other question from a practical standpoint. You have to take that into account.

In the work which I do I examine a wire which is worn and I will determine the length of time that it has got to be

watched, or I might bring out the fact that we have lost part of our factor of safety and we have got to be aware of that.

The Court: In other words, there must be that difference at all times for the purpose of safety considerations between [fol. 99] the existing breaking load due to the then condition of the wire and the rated safety safe working load which you would apply to it, is that correct?

The Witness: Yes, your Honor. Picking up an expensive case, putting it aboard a ship, and you have a sling which has been around for three or four months and shows wear, it is not defective but we want to get the full factor safety out of new wire breaking strain, so I would recommend to put a new sling on.

The Court: So as to give to the particular item of cargo the full rated safety load.

The Witness: That is correct.

The Court: You may pursue the matter from there.

Q. Mr. Byrne, you said that if the breaking strain was reduced substantially then the safe working load would diminish?

A. Yes.

Q. And is there any point at which you feel that the safe working load would diminish if the breaking strength diminished?

A. I think it is a constant and continuing problem.

Q. If the breaking strain of the rope diminished say ten per cent, would you consider that a substantial diminution?

A. I would. I would start getting very wary of the wire.

Q. Would you reject the wire?

A. I might.

Q. But that would depend on other factors, would it not, whether you would reject it or not?

A. Yes, that is why it is a difficult thing to discuss.

Q. What are the other factors?

Mr. Monigan: I do not think the witness finished.

The Court: Did you finish?

[fol. 100] Q. What are these other factors?

A. The general appearance of the wire, whether or not it appears to be true in formation, whether it is dried out it shows any sign of corrosion, if it has any wires cut, if fraying starts, things of that kind.

Q. If those conditions do not exist then you still would use that wire?

A. Yes.

Q. And even though the breaking load has been reduced, isn't that right?

Mr. Monigan: It is argumentative. I object to it.

The Court: Mr. Cichanowicz has a certain way of speaking, and I realize that, so I am going to overrule your objection. You see, you make statements, Mr. Cichanowicz, but I realize that it is your method of putting a question. Try to frame your question in a purely interrogatory form and avoid statements.

Q. In other words, under those circumstances you would still keep the wire even though the breaking strain has been reduced?

The Court: Or would you under those circumstances—put it that way.

The Witness: Yes, depending upon how extensive the damage, let us say, or the wear is. If it was not bad, then you might say—identify it, give warning that this is starting to go, beware of it. And in my opinion from the work that I do as a safety man, I am not held to any exact safe working load.

I would take into account the condition of the wire.

.

[fol. 101]

**Claimant's Supplemental Appendix in Nos. 12,138,
12,139 and 12,140—Filed June 29, 1957**

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

JOHN H. CRUMADY, Libellant-Appellant,

Against.

**JOACHIM HENDRIK FISSER, Her Engines, Tackle, Apparel,
etc. and JOACHIM HENDRIK FISSER and/or HENDRIK
FISSER, Respondent-Claimant-Appellee and Appellant,**

Against

NACIREMA OPERATING Co., INC., Impleaded Respondent.

TRANSCRIPT OF TESTIMONY (EXCERPTS)

Excerpt from testimony of PETER PETERS, Master of the
S. S. Joachim Hendrik Fisser, called as a witness by the
claimant.

• • • • •
Cross examination.

By Mr. Brass:

Q. Is it safe to use a winch which has a shut-off device
when the load reaches six-ton and the topping lift has a
safe working capacity of three-ton, and the runner has
a safe working capacity of three-ton, and the boom has
a safe working capacity of three-ton?

The Court: Do you understand that question? Can you
interpret it?

The Interpreter: I can.

—
All emphasis supplied unless otherwise indicated.

Mr. Cichanowicz: I would like to renew my objection to the characterization of safe working capacity.

The Court: Safe load capacity is your preference?

Mr. Cichanowicz: Safe working load.

Mr. Brass: I will amend the question accordingly.

The Court: Use the word load where he has used the word capacity.

(Last question repeated by the Reporter with amendment.)

The Witness: (In English) There is no prescribed rule that there has to be a cut-off there. It was my idea that this was put in there.

Mr. Brass: If your Honor please, I do not think that answers the question.

[fol. 102] The Court: Is it safe, Captain, to have that combination of that type of winch with that device in conjunction with the topping lift boom and runner of a lower capacity?

The Witness: No, it isn't.

The Court: It is not dangerous?

The Witness: No.

The Court: He used the word "Gerfahrlich" which means dangerous.

Mr. Brass: What was the answer?

The Court: He said it was not dangerous to use that winch in combination with the other gear of the respective capacities which you have mentioned. "Gerfahrlich" means dangerous. He said it was not dangerous, "Neicht Gerfahrlich."

Excerpts from testimony of ROBERT A. SIMONS, called as a witness by respondent impleaded.

Direct examination.

By Mr. Monigan:

Q. Are you familiar with any prescribed standard design of safety factors in the design of ship winches which

are to be used to power cargo runners for the discharge or unloading of cargo on a vessel?

A. Yes.

Q. What has your experience, either theoretical or practical, in that respect been?

Mr. Cichanowicz: I object to the competency of this witness. I don't believe he has been qualified.

The Court: He is just asking now what his experience has been. I take it that is for the purpose for qualifying him.

[fol. 103] Mr. Monigan: It is my hope to.

The Court: Objection overruled.

The Witness: We purchased and designed or made calculations as to what winches were required, what size winch and where to place them on innumerable rigs on various vessels. That is all part of the design. We decided how much pull the winch should have, what type of winch to put in and so forth. I have repaired and taken apart many winches on board ships.

The Court: Electric and steam?

The Witness: *Steam only.*

The Court: *No electric.*

The Witness: *No electric.*

Q. Have you had any experience so far as the automatic cut-off device in electric winches is concerned?

A. Yes.

Mr. Cichanowicz: I object to that. This man says he has no experience with electric winches.

The Court: That was my understanding.

Mr. Monigan: I think the witness was misunderstood. I just asked him this question to which he responded yes.

Q. What has been the nature of your experience in respect of automatic cut-offs on electric winches?

A. Well, in the design and surveying on board ship we have had to design rigs with innumerable electric winches, and I personally have never specified what the cut-off on a winch should be, but I have learned through experience what they generally set the cut-off on winches at.

[fol. 104] Q. That is electric winches?

A. Yes.

Q. What has been your experience so far as the knowledge of the existence of automatic cut-offs in electric winches?

A. Only what I have learned talking to the men that sell winches, the men that design the electrical circuits for winches in the engineering field.

Q. Is there a standard practice so far as you know prescribing an automatic cut-off on electric winches?

A. Well, it is generally around fifty per cent overload and the winch cuts out.

Mr. Cichanowicz: I object again. This is just a method of getting around the other.

The Court: *The unfinished answer will be stricken.*

Q. What if any is the prescribed standard of percentage of such safe—such automatic cut-off device to the weight which the winch is designed to lift?

A. *I, myself, know of no regulation, since I have not been that closely connected to that part of the winch. However, from practice in the field—*

The Court: I do not like to interrupt you. You have just said that you have not been sufficiently closely related to that part of it.

The Witness: To answer that question.

The Court: Stop there and wait for the next question.

Q. *Is there any—apart from any government regulation—any prescribed standard of design which can be expressed [fol. 105] in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch?*

A. *I don't know.*

Cross examination.

By Mr. Brass:

Q. Did I understand you to say that it is not safe practice to have a runner with a safe working load of three-ton, a boom with a safe working load of three-ton, a topping lift with a safe working load of three-ton, and a winch which had a shut-off device of the current at six-ton or better?

A. I did not say that.

Q. What did you say?

A. I said that it is not safe practice to have a rig that was designed for three tons working load and of the winch with a cut-off set at six tons so that you could apply six tons load to the hoist before the winch would cut off because that would be doubling the load for which the rig was designed for.

Excerpts from testimony of WALTER J. BYRNE, called as a witness by respondent impleaded.

Cross examination.

By Mr. Brass:

Q. Are you familiar with cut-offs on electric winches?

A. I am familiar with the end result.

Q. What do you base your familiarity on with the end result?

Mr. Cichanowicz: I object to that question. It is not responsive.

[fol. 106] The Court: You cannot, Mr. Brass is the only one that can object on that ground. Objection overruled.

The Witness: I don't remember your question.

Q. On what do you base your familiarity with the end result of cut-offs on electric winches?

A. Well, if you have three-ton gear and a three-ton winch and due to cut-offs in back you allow, let us say, a hundred per cent overload to be developed, then I think from my point of view as a safety man you are taking away a governor. You are taking away something which is built in for the protection of the gear and personnel.

• • • • •
Cross examination.

By Mr. Cichanowicz:

Q. Mr. Byrne, do you know what an overload device is?

Mr. Monigan: *The witness has not offered himself as an electrical engineer. What is an overload device but—it depends on what kind of an overload device, but if the interrogation is directed to the mechanics or the electronics involved in overload devices, I think it is beyond the scope of the direct examination and it is improper recross.*

The Court: Well, in the first place, the question is not complete. There are all kinds of overload devices. I think even in the human body there are. What do you mean, on a winch, on an electric winch?

Mr. Cichanowicz: Obviously, he is talking about the end result of an overload device. I am trying to find out what he is talking about.

The Court: You are asking him whether he is familiar with the nature of an overload device on an electric winch, is that it?

Mr. Cichanowicz: That is correct.

[fol. 107] The Court: I will overrule the objection.

The Witness: *I am familiar with it ONLY again from the end result.*

• • • • •
The Court: I have a point and I am going to make a suggestion to you. If you want to you can ask the witness how the load is fixed, is it built in or is it variable by that manipulation. I do not mean the load, I mean the cut-off point. Go ahead.

Mr. Cichanowicz: I will adopt the question, if I may.

The Court: All right.

The Witness: I always understood it was variable.

The Court: It would be adjusted.

Q. *And that is what you are talking about is the variable adjustable one?*

A. Yes.

Excerpt from testimony of JOHN JOSEPH SMITH, taken by deposition, which was referred to by trial court in its opinion (Appellant's Appendix 33a).

Q. Now, Mr. Smith, I show you this document which consists of five pages and a blue back which is marked R-42 for identification, and ask you to tell us whether you know what this is.

A. It's the stevedoring contract concluded between Insular Navigation Company on behalf of our principals and Nacirema Stevedoring Company.

Q. Does your signature appear on this document?

A. Yes, it does.

Q. And is this your signature; that is, referring to page—

A. Yes, it is.

Q. —page, which is marked page 4 and appears under Insular Navigation Company.

[fol. 108]

IN UNITED STATES DISTRICT COURT

STEVEDORE CONTRACT REFERRED TO BY TRIAL COURT

(Appellant's Appendix 33a)

This agreement, made and entered into this 30th day of December, 1953, between Insular Navigation Company as Owner, Operator, Charterer or Agent, and Nacirema Operating Co., Inc. Contractor, will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of

Port Newark, New Jersey effective December 30, 1953 and the Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor, at the agreed rates, terms, and conditions specified below:

DISCHARGING

285,000 Board Feet Nicaraguan Pine from m.v. "Joachaim Hendrik Fisser" scheduled to arrive Port Newark January 2.

Rate: \$4.75 Per thousand BM if stowed fore and aft.

Rate: \$5.75 Per thousand BM if stowed crisscrossed.

Contractor agrees to furnish service of delivery clerk during discharge of vessel at actual cost plus 10% for overhead and supervision.

1. TYPE OF VESSELS: The stevedoring rates specified in this agreement apply to cargo vessels including those vessels with minimum passenger accommodations.

2. COMMODITY RATE INCLUSIONS: As part of the foregoing specified rates, the Contractor agrees to include in the commodity rates the following described services:

[fol. 109] a. Transport Contractor's gear and equipment to and from the pier where the vessel is berthed, excepting locations that are inaccessible to motor trucks.

b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work.

c. Adjust rigging of booms and guys, etc., at hatches where work of discharging and/or loading will be conducted and unrigging when completed, also removing and replacing beams and hatch covers.

d. Discharge cargo from or load cargo into vessel's holds, tween decks, on deck, shelter or bridge spaces,

deep tanks, cargo lockers and lazarettes, also temporary bunker spaces, but excluding fore and aft peaks and bilges.

- e. Shift gangs as required between inshore and off-shore, also from lower to upper floor (or vice versa) on double deck piers. Shift lighters into working position after they have been placed alongside vessel, when this can be done without tugs.
- f. Sort (by longshoremen) and stack cargo man high on pier upon discharge of vessel or break down cargo from man high on pier upon loading of vessel.
- g. Perform such long trucking as required within limits of pier where vessel is berthed—limited to the section occupied by the vessel, should the pier have multiple sections.

[fol. 110] h. Load and lay dunnage boards (except freighted dunnage lumber) as required during loading for proper stowage of cargo.

- i. Work two gangs simultaneously in hatches when required and when practical to do so, provided necessary additional booms, falls and winches are supplied by vessel or from shore facilities.

3. EXTRA LABOR SERVICES: When required to supply extra labor, the Contractor will render its charges therefor upon the basis of the labor cost incurred plus 10% and insurance at 15½% for the following described services:

- a. Handling ship's lines and gangways.
- b. Cleaning ship's holds.
- c. Discharging excess dunnage or debris.
- d. Tiering cargo on pier above man high upon discharge of vessel or breaking down cargo on pier to man high upon loading of vessel.
- e. Loading or discharging ship's stores, material or equipment, mail, baggage, specie, bullion, livestock, animals, live poultry and birds.

- f. Carpenter or coopering work of any nature.
- g. Handling and placing flooring or timbers for heavy lifts or for use by carpenters.
- h. Services of Harbormaster for the berthing and unberthing of lighters.
- i. Lashing and shoring cargo.
- j. Bolting and unbolting tank lids.
- [fol. 111] k. Battening down hatches when called upon to do so upon completion of the vessel.
- l. Rigging and unrigging heavy lift booms.
- m. Supplying extra labor for any other services when authorized.

4. **RIGGING/UNRIGGING HATCH TENTS:** When required to use hatch tents, the Contractor will charge \$20.00 per tent to represent the initial rigging and final unrigging combined; and no charge will be made for intermediate rigging or unrigging of the tent during the working of the vessel.

5. **INCOME FROM HANDLING LIGHTERS AND CARS:** The Contractor shall collect and retain its customary charges for labor services in connection with the loading and unloading of railroad cars, lighters, barges and scows.

6. **EQUIPMENT:** The ship is to supply booms, adequate winches, in good order and with sufficient steam or current for their efficient operation; blocks, topping lifts, guys; wire or rope falls of sufficient length and strength, hatch tents, lights for night work; tugs; derricks or cranes for such heavy lifts as exceed the capacity of the ship's gear, and cranes in the absence of ship's winches. The ship is also to supply dunnage, paper and all material for shoring and lashing cargo as well as grain bags and separation cloths.

The Contractor is to supply all other cargo handling gear and equipment, such as hooks, pendants, save-alls,

nets, trays, bridle chains and slings (except slings for heavy lifts when hoisted by heavy lift floating or shore derrick) also hand trucks, mechanical trucks or tractors, [fol. 112] also dock tractor cranes as needed for efficient stevedoring work.

7. **INSURANCE:** The Contractor agrees to carry and include in the rates herein specified, Workmen's Compensation Insurance for the unlimited protection of its employees under State and Federal Laws, also Public Liability Insurance for the protection of third parties who have suffered, or alleged to have suffered death or bodily injuries thru the acts of the Contractors' Employees, such Public Liability Insurance to be in the amount of \$50,000 for bodily injury or death of one person, and \$150,000 for death or injury to more than one person in a single accident.

The rates specified herein also include Social Security Taxes and Unemployment Insurance as presently payable by the Contractor. Whenever actual labor wages are to be charged for by the Contractor under this agreement, the Social Security Taxes and Unemployment Insurance incurred thereon shall be added to charges for Workmen's Compensation and Public Liability Insurances, and all such charges shall be termed "Insurance".

8. **RESPONSIBILITY FOR DAMAGE OR LOSS:** The Contractor will be responsible for damage to the ship and its equipment, and for damage to cargo, or loss of cargo overside through its negligence. When such damage occurs to ship or its equipment, or where loss or damage occurs to cargo by reason of such negligence, the Ship's Officers or other authorized representatives will call this to the attention of the Contractor at time of accident.

Property Damage Insurance in an amount of \$1,000,000 with deductible amount of not over \$10,000.

[fol. 113] 9. **DETENTIONS, WAITING, LAY TIME:** Whenever work is interrupted after starting and detentions of no over 20 minutes duration occur, the Contractor will mak

no charge for reimbursement therefor. Should such detention time exceed 20 minutes duration, the Contractor will charge for the full detention time at labor cost plus insurance. When men are employed and unable to work through causes beyond the Contractor's control, or when men are to be paid for a minimum working period in accordance with the wage agreement, the cost of such waiting or idle time will be charged for by the Contractor at labor cost, plus insurance at 15½%.

10. OVERTIME: When overtime hours are worked, the additional wages thereby incurred and paid to all labor and other stevedoring personnel so employed, will be charged for by the Contractor at cost, plus insurance.

In the event that, under any Government Order or final determination by a court of competent jurisdiction, labor is required to be paid wages in excess of the wages paid under the Federal Fair Labor Standards Act as presently interpreted throughout the port, such wages plus insurance and social security and unemployment taxes together with any additional amount other than wages for which the Contractor may be legally liable under the Act, shall be reimbursed to the Contractor by the Owners, Agents, or Charterers at cost.

11. TRAVEL TIME AND TRANSPORTATION: When the Contractor is required to work at locations where travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at cost, plus insurance. When vessels are worked in the stream or [fol. 114] other places where means of transportation for the men are required or meal allowances must be paid in accordance with the wage agreement, any expense so incurred will be charged for at cost.

12. STRIKES, ETC.: In the event of strikes, lockouts, Union disputes or other labor difficulties, the Contractor will, if able to work, do so upon a basis of cost, plus 20% and insurance at 15½% in lieu of rates specified, unless notified by the Owners, Agents or Charterers that no work is to be performed.

13. **INCREASE OR DECREASE IN WAGES:** All rates specified are based on and subject to the employment of present longshore labor at the wage scale and working conditions existing in the port in the month of September 1953 under the International Longshoreman's Association Agreement. In the event of an increase or decrease in such wage scale or change in the present longshore labor or working conditions, the rates specified herein shall as a consequence be proportionately increased or decreased.

14. **REHANDLING OR SHIFTING OF CARGO:** The rates specified herein apply to one handling of cargo. When rehandling, resorting or shifting of cargo is necessary through no fault of the Contractor, the time required for such work will be charged for by the Contractor at cost, plus 10% for overhead and gear, plus insurance at 15½%.

15. **DAMAGED CARGO:** When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Contractor's charges are to be based on the labor cost in accordance with the International Longshoremen's Association Agreement, plus 20% for overhead, depreciation of gear, and profit, plus insurance at [fol. 115] 15½% in lieu of the rates specified herein together with the cost of the gear destroyed and the cost of the equipment for the protection of the men as may be required.

16. **CONDITION OF CARGO:** If the condition of the cargo or packages is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

17. **AMMUNITION AND EXPLOSIVES:** Are not included in this agreement.

18. **ACTS OF GOD, WAR, ETC.:** No liability shall attach to the Contractor, if the terms of this agreement cannot

be performed, due to the Acts of God, War, Governments, Fire, Explosion, or Civil Commotion.

19. This agreement may be terminated, modified or amended upon thirty days' notice by either party, provided, however, that notwithstanding any such termination, the Contractor shall continue to be responsible for the loading or discharging of any cargo which the Contractor is handling on the effective date of such termination. Termination of this agreement shall not affect or relieve either party of any liability or obligation that may have accrued prior thereto.

20. This agreement does not include any services of clerks or checkers.

Insular Navigation Company, Owner/Operator/
Charterer/Agent, By: J. J. Smith.

Nacirema Operating Co., Inc., Contractor, By
Andrew G. Dantzler, Vice Pres.

[fol. 116]

**Supplemental Appendix of the Respondent-Impleaded
Appellant, No. 12,140 and Appellee in Nos. 12,138,
12,139—Filed July 3, 1957**

**IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JOHN H. CRUMADY, Libellant-Appellant,

against

**JOACHIM HENDRIK FISSER, Her engines, tackle, apparel, etc.
and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER,
Respondent-Claimant-Appellee and Appellant,**

against

**NACIREMA OPERATING Co., Inc., Impleaded Respondent
Appellant and Appellee.**

TRANSCRIPT OF TESTIMONY (EXCERPTS)

COLLOQUY

Mr. Cichanowicz: I am only offering this, and the contract speaks for itself. Whether it is between the ship-owner or the charterer, I think the contract indicates that.

Mr. Monigan: My objection is directed to the competency of the proffered paper.

The Court: You have no objection to its authenticity?

Mr. Monigan: No, your Honor.

The Court: I would be ruling in a vacuum unless I knew what the document contained. If you want to show it to me I will endeavor to make a ruling upon the present objection which goes to its competency.

Mr. Monigan: Quite so, your Honor, it appears on the first page of the agreement which I think perhaps should be

designated by an identification number so the record will reveal the matter which we are talking about.

It is between Insular Navigation Company and Nacirema Operating Company, it being a contract in writing and it cannot possibly bind anyone other than those who are parties thereto; that so far as the respondent-impleaded is concerned, the agreement is not made with any parties to the present action and therefore it is not competent to bind Nacirema in respect of the action between the Crumady, libelant, and the vessel, respondent.

The Court: There is no question, is there, Mr. Monigan, but that Nacirema Operating Company, Inc., is a party to this document?

Mr. Monigan: No question, your Honor.

The Court: And the other party seems to be Insular Navigation Company in its capacity as owner, operator, charterer or agent.

Mr. Monigan: That is so. The reason that the matter becomes of concern at this stage of the proceedings, is that I assume counsel for the vessel is offering this document in order to avail themselves of the doctrine of those cases which concern themselves with an alleged breach of a stevedoring contract between a vessel and a stevedore.

[fol. 117] This contract which has been proffered by counsel for the vessel manifestly is not a contract between the vessel and the stevedoring company. There has been some authority in the very few cases in which this matter has come before the court, as your Honor knows, it is one of relatively recent origin under the *Ryan Stevedore* case in which there being no indemnity, that is no written indemnity for a loss such as the libelant sustained in the present matter, the only relevancy or competency of the matter is because of an alleged breach of a contract to stevedore.

Now, there was in the *Ryan* case, of course, a direct contract between the vessel and the stevedore and it was upon the implied warranty akin to that which was under the Sales Act in which the court in the *Ryan* case permitted an action by the vessel over the cause of a breach of a warranty.

Now, the situation in respect to the analogy of breach of warranty which was applied by the Court in the *Ryan* case would preclude the vessel, which is not a party to this con-

tract, from asserting any breach of warranty because of the absence of privity of contract.

In the writing itself there is no suggestion that the contract was made for the benefit of the vessel and indeed the only case which I have been able to discover in which a contract such as this which is proffered by counsel was offered in evidence was an attempt to justify on the third party beneficiary theory and that was denied by the court. It was in the District of California.

We also have one in our own district which is not a stevedoring contract but it suggests the general rule which is applicable to such contracts, that in order that there be a cause of action possible under the contract there must be a clearly intended purpose on the part of both contracting parties to create a benefit in another person.

Now, the case to which I have reference in the Southern District of California, is 72 Fed. Supp. 574, at 588. There was a contract between the—well, let us put it this way: The United States contracted with a shipyard to build a [fol. 118] vessel. The vessel was built. It was under lease to the Ministry of Transport of the United Kingdom. The United States made a contract with the stevedoring company to load the vessel which was to go to the Far East. A longshoreman was injured aboard the vessel and this matter of liability of the stevedores' employer was brought before the court. It was a complicated case because of the sovereign immunity and diplomatic immunity and so on, but so far as here pertinent the court's opinion on page 588 of 72 Fed. Supp. says that that contract between the United States and the stevedoring company was not a contract for the benefit of the third party, so that it would inure to the benefit of the Ministry of Transport of the United Kingdom.

I believe that the analogy to the present matter is quite evident.

The second case to which I had reference was the Isbrandtsen Line against Local 1291. That is the Court of Appeals in the Third Circuit, 204 Fed. (2d) 495. That was not a stevedoring contract in the same sense that we are discussing it here, it was a cause of action which was sought to be alleged by the vessel because of delay in the loading of the vessel.

The Court: Was there demurrage involved?

Mr. Monigan: I believe so, and the charterer of the vessel had made the contract with the stevedores and the Court of Appeals said that that contract was not one for the benefit of the vessel, and hence, whatever undertakings the stevedore made—stevedores made with the charterer were not such as to benefit the vessel.

For those reasons I believe that the proffer of the paper writing bearing date December 30, 1953, between Insular Navigation and Nacirema Operating Company is not admissible in the present matter since Insular Navigation is not a party to the action, the only basis for the liability asserted against the respondent-impealed must be that which the vessel itself asserts or its owner, and neither is a party to the contract proffered.

[fol. 119] The Court: What have you to say to the objection of counsel on the grounds stated therefor, Mr. Cichanowicz?

Mr. Cichanowicz: I have very little to say, that the offer is being made on the theory that the shipowner was a third part beneficiary of this contract. There was no contention being made that the contract was made directly with the vessel, and I believe that it is evident from the wording of the contract that there was—or that the shipowner was a third party beneficiary. I believe that differs from the situation of the cases mentioned by counsel.

The Court: Let me interrupt you there. The only indication of a possible interest of a concern other than Insular Navigation Company and the vessel is to be found in the characterization of Insular Navigation Company as owner, operator, charterer or agent. *Assuming that the last of those words, agent is the one to be relied on, does it indicate—does the document indicate anywhere for whom Insular Navigation Company was acting as agent in entering into the contract.*

Mr. Cichanowicz: No, it does not. We will go one step further and say that in fact, I believe that Captain Jacobson testified that they made it as agent for the charterer. I mean, I will make that statement on the record. (Italics supplied.)

The Court: Entirely apart from that what is the pur-

pose of your offer? What do you want to show by this document?

Mr. Cichanowicz: Primarily to show what the obligation of the stevedore was under the contract, and also to show the fact that this loading was done according to the footage instead of by hours and things of that nature.

The Court: There is no question in this case that the libellant was an employee of Nacirema?

Mr. Cichanowicz: No.

The Court: There is no question in this case that Nacirema Stevedoring contractor was employed by someone to unload the vessel?

[fol. 120] Mr. Cichanowicz: No, there is no question.

The Court: I do not see from a cursory examination of the document anything within it which would appear to be relevant, entirely apart from the basis of the pending objection, there is no undertaking, as I read it, on the part of Nacirema to handle cargo in any particular manner except to furnish slings and certain equipment, the major equipment to be used is expressly provided to be furnished by the vessel, and although there are four characterizations of the party of the first part any one of which might be selected, there is nothing within the four corners of the document to indicate that the Insular Navigation Company was acting either for the vessel or for the vessel's owner, since I understand that the owner of the vessel is Joachim Hendrik Fisser, is that correct?

Mr. Monigan: Corporation, yes.

The Court: I will sustain the objection to the offer. The offer may be marked for identification so that it may be referred to in any subsequent proceeding as the subject of this ruling.

(Contract marked Exhibit R-42 for identification.)

The Court: I might say that if counsel for the vessel can show by additional evidence, and cite controlling authority, the offer may be renewed. But as in the present posture of the proof, I can see no relevancy or competency in the proffered document, and hence my present ruling.

[fol. 121]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138

No. 12,139

No. 12,140

JOHN H. CRUMADY, Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSEr, Her Engines, Tackle, Apparel,
etc., and JOACHIM HENDRIK FISSEr and/or HENDRIK
FISSEr, Respondents,

v.

NACIREMA OPERATING Co., Inc., Impleaded
Respondent-Appellant in No. 12,140.

HENDRIK FISSEr ARTIEN GESSELSCHAFT,
Claimant-Appellant in No. 12,139.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Argued June 13, 1957

Before Maris, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed September 30, 1957

HASTIE, Circuit Judge.

Proceeding in rem against the ship Joachim Hendrik Fisser, the libellant Crumady has sued in admiralty to hold the ship and its owners responsible for personal injuries [fol. 122] suffered by him while working on the ship as a stevedore employed by Nacirema Operating Co. in the unloading of the vessel at a berth in Port Newark, New Jersey.

The respondent impleaded libellant's employer, Nacirema Operating Co., seeking thereby to obtain indemnification for any loss it might suffer through this suit.

After full hearing the court held the ship liable, ruling that one factor which contributed to the accident was the unseaworthiness of certain equipment of the ship. The court also allowed the ship to recover over against Nacirema, the party whose negligence, in the court's view, was the "sole, active or primary cause" of the accident.

Each of the parties has appealed. The ship challenges the ruling as to unseaworthiness. Nacirema claims that in any event there was no basis for holding it to indemnify the ship. The libellant complains that the amount of the award was erroneously determined and grossly inadequate.

We consider first the way the issue of unseaworthiness arose and was determined. The libel itself asserted a claim in admiralty for injury caused by the negligence of a ship and its owners; and nothing else.¹ There was no claim that unseaworthiness caused the accident or even that any unseaworthy condition existed. However, discussion at a pre-trial conference seems to have led the court to conclude that libellant's contentions included a claim predicated upon unseaworthiness. In any event, the transcript of the trial judge's statement at the conclusion of the pre-trial conference shows that he undertook to frame the issues, saying, apparently with the acquiescence of the parties, that the libellant "contends in effect that the injuries complained of resulted from the unseaworthiness of the vessel. . . ." In addition, the court made it clear that the [fol. 123] structure alleged to have been unseaworthy was a cable or topping-lift which parted causing a boom which it supported to fall upon the libellant. Thereafter, libellant's proof was directed at establishing that the topping-lift was worn and defective and, for that reason, parted under

¹ Since *Pope & Talbot, Inc. v. Hawk*, 1953, 346 U.S. 406, it has been authoritatively established, if not unanimously agreed, that admiralty affords an injured workman so situated as libellant two distinct causes against the ship, one for negligent injury and the other for injury caused by the unseaworthiness of the vessel, although, of course, there can be only one recovery of damages for the same personal injuries.

the strain of lifting cargo which sound gear would have withstood.

The evidence relevant to this theory of liability was conflicting and the court, with adequate basis in the record, found as a fact that the topping-lift was not defective but "was adequate and proper for the loads for which the rest of the gear was designed and intended". The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed. In addition, though forbidden to change the position of the head of the boom which the crew of the vessel had placed over the center of the hatch, they had changed the attachment of the preventer and guy which controlled the position of the boom so that the head of the boom was no longer over any part of the hatch but had been moved a distance to port of the hatch opening. The excessive and abnormal strain which this incorrect procedure imposed upon the topping-lift will be discussed later. It suffices to point out now that the court with justification attributed the accident primarily to this negligence of Nacirema.

But having thus eliminated the basis of unseaworthiness formulated at pre-trial, the court found and adopted a new theory of the ship's unseaworthiness and responsibility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. An understanding of the court's reasoning requires the consideration of additional circumstances not heretofore mentioned.

[fol. 124] The gear being used at the time of the accident was rated and approved to lift a load of three tons or less. In the actual unloading operation a cable, called a cargo runner, was attached to the object to be lifted from the hold. This runner extended upward over a block at the end of a boom high above the hold and thence to and around a winch powered by an electric motor. The electrical equipment in this case included an automatic circuit breaker which stopped the flow of power to the winch whenever the

current built up beyond the amperage for which the device had been set. Witnesses were asked to relate the cut off amperage to the strain imposed upon the winch by the load it was lifting. The witnesses agreed that the cut off was set so that if the motor should be required to overcome a strain on the cargo runner somewhat in excess of six tons the current would quickly build up to the setting of the circuit breaker and the motor would automatically cut off. In this case, the motor did cut off, apparently just before the topping-lift parted.

The libellant seems to have introduced testimony about the cut off device in an effort to show that the power was cut off before the gear was subjected to any greater strain than it should have been able to withstand. But in analyzing this testimony, much of which was a rather confused discussion of "load" and "torque" and other electrical concepts induced by questions addressed to the witnesses as though the concepts were mechanical rather than electrical, the court concluded that it was unsafe practice, rendering the gear unseaworthy, to have the cut off set so that the circuit would not be broken until the tension in the cargo runner should exceed six tons. In other words, the court thought the rating of the gear to handle a cargo load of three tons indicated that it was unsafe to have the circuit breaker so set that the cargo runner might be subjected to a six ton strain.

While the court's reasoning was in accord with an opinion expressed by a witness, the application of mathematics to [fol. 125] the undisputed facts requires the rejection of that opinion and the acceptance of other testimony, based in part upon a Coast Guard standard for the setting of such a control, indicating that the setting of the cut off device was entirely safe and proper. The testimony was clear and undisputed that hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage. Indeed, as the testimony shows and the laws of physics teach, inertia,

friction and the normal circumstances of operation make it necessary that substantially more than a three ton strain be imposed upon the gear before a three ton load can be lifted. Thus, the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

This was demonstrated by what happened in the present case. A strain of six tons or more on the cargo runner had no effect on that cable. The circuit breaker cut off the power at that point, while the strain was still well within the capacity of the cable. By the same token, if this operation had been conducted normally and properly the strain on the topping-lift would have been well within its capacity when the circuit breaker intervened. For this part of the gear also was rated to handle three tons of cargo and thus could withstand a fifteen ton strain.

The decisive fact, as the court found it, was that the employees of Nacirema had so changed the position of the head of the boom as to seriously distort the normal composition of forces which is presented by a straight lifting operation. It was for this reason that the topping-lift was subjected to an enormous, abnormal and unanticipated strain. On the basis of expert testimony the court found as [fol. 126] a fact that this strain was somewhere between seventeen and twenty-one tons, three or four times the strain then being imposed on the cargo runner and the winch.

This analysis leads to two conclusions. It was a proper finding that the negligence of the stevedores was "the sole active or primary cause" of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema "brought into play the unseaworthy condition of the vessel". The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.² Applied to the present facts, this means that the

² *The Silvia*, 1898, 171 U.S. 462; *Doucette v. Vincent*, 1st Cir. 1952, 194 F.2d 834; see *Berti v. Compagnie de Navigation Cyprien Fabre*, 2d Cir. 1954, 213 F.2d 397, 400. Cf. *The Daisy*, 9th Cir. 1922, 282 Fed. 261.

setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred.

A decree should have been and now must be entered denying the libellant recovery. In these circumstances we do not reach the substantial question raised by the impleaded respondent whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained.

The judgment will be reversed.

[fol. 127]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 12138, 12139, 12140

JOHN H. CRUMADY, Appellant in No. 12,138,

vs.

JOACHIM HENDRIK FISSE, her engines, tackle, apparel, etc.,
and JOACHIM HENDRIK FISSE and/or HENDRIK FISSE,

vs.

NACIREMA OPERATING Co., INC., Appellant in No. 12,140.

HENDRIK FISSE AKTIEN GESSELLSCHAFT,*
Claimant-Appellant in No. 12,139.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Present: Maris, Staley and Hastie, Circuit Judges.

JUDGMENT—September 30, 1957.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest: Ida O. Creskoff, Clerk.

[fol. 128]. [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,138 and 12,139

JOHN H. CRUMADY (Libellant), Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc.
and JOACHIM HENDRIK FISSER and/or HENDRIK FISSER
(Respondent-Claimant), Appellant in No. 12,139,

v.

NACIREMA OPERATING Co., INC. (Impleaded Respondent).

LIBELLANT'S PETITION FOR REHEARING—Filed
October 15, 1957

[fol. 129] **TABLE OF CONTENTS TO LIBELLANT'S
PETITION FOR REHEARING**

	PAGE
Preliminary Statement	117
The Vessel Should Have Been Held Liable Regard- less of Whether the Unsafe Condition of the Boom Was Rigged by the Ship's Crew or the Stevedore	118
The Incompetence of the Stevedore Rendered the Vessel Unseaworthy	121
This Court Erred in Overruling the Fact Finding of the Court Below	124
Conclusion	128

[fol. 130] **TABLE OF CASES CITED**

	PAGE
Aguilar v. Standard Oil Company, 318 U.S. 724, 736 ..	121
Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336	117, 122, 123
Mahnich v. Southern S.S. Co., 321 U.S. 96, 104	120
Osceola, Thé, 189 U.S. 158, 175	120
Petterson v. Alaska S.S. Co., 205 F.2d 478, affirmed per cur. 347 U.S. 396	117, 118
Pope and Talbot v. Hawn, 346 U.S. 406	118
Rogers v. United States Lines, 205 F.2d 57, reversed 347 U.S. 984, 98 L. Ed. 1120	117, 118
Seas Shipping Company v. Sieracki, 328 U.S. 85	118, 120
Shields v. United States, 175 F.2d 743	121
West v. United States, 246 F.2d 443	123

[fol. 131]

PETITION FOR REHEARING

Libellant prays your Honorable Court for a rehearing in the within matter for the following reasons:

The decision of this court is in direct conflict with the decisions of the Supreme Court of the United States in *Petterson v. Alaska S.S. Co.*, 205 F.2d 478, affirmed per curiam 347 U.S. 396; *Rogers v. United States Lines*, 205 F.2d 57, reversed 347 U.S. 984; and *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336.

[fol. 132] In addition, the factual finding which this court adopted in overruling the court below is also clearly erroneous.

PRELIMINARY STATEMENT

The court below found that the vessel was unseaworthy because the cut-off device in the winch was set to shut off the power only after the load being lifted was more than twice the safe working load of the cables. The court below also held that the boom was rigged by the stevedores at such a dangerous angle that it imposed an excessive strain upon the cable, and it was this factor which brought into play the unseaworthy condition of the winch. The ship was, therefore, held liable to the injured longshoreman because of the unseaworthy winch, and the ship was allowed indemnity over against Nacirema, the stevedoring company, because of the improper rigging of the boom.

This court reversed the finding that the winch was unseaworthy upon the ground that the lower court's opinion in this respect was "mathematically" incorrect, and held that the sole cause of the accident was the dangerous condition of the boom as it had been rigged by Nacirema.

It is here contended that this court erred in absolving the ship, because even if the factual premise be correct the ship was responsible for the unseaworthy condition of the boom, regardless of whether it was rigged by the ship's crew [fol. 133] or the stevedore. Moreover, implicit in the factual premise of this court is the conclusion that Nacirema, the stevedore, was incompetent to perform the work of rigging the boom and this incompetency also rendered the vessel unseaworthy.

The Vessel Should Have Been Held Liable Regardless of Whether the Unsafe Condition of the Boom Was Rigged by the Ship's Crew or the Stevedore

The Supreme Court of the United States, in a series of decisions starting with the case of *Seas Shipping Company v. Sieracki*, 328 U.S.-85, held that the longshoremen were "seamen," and entitled to the benefit of the warranty of seaworthiness, as though they were members of the ship's crew. In *Pope and Talbot v. Hawk*, 346 U.S. 406, the court reaffirmed its holding in *Sieracki* and pointed out that the longshoremen were vested with the same rights against the vessel as members of the crew, with the exception of the right to maintenance and cure.

In *Pettersen v. Alaska S.S. Co.*, supra, a longshoreman was injured because of an unseaworthy condition created by a defective block which had been brought on board and rigged by the stevedores. The Court of Appeals for the Ninth Circuit held that it made no difference that it was brought on board and rigged by the longshoremen. It was sufficient that it was used in connection with the ship's business, and if it were, in fact, unsafe then the vessel was [fol. 134] unseaworthy and liable for injury to the longshoremen. The Supreme Court affirmed per curiam upon the authority of its decisions in the *Sieracki* and *Hawk* cases.

In *Rogers v. United States Lines*, supra, the Supreme Court adhered to the same rule upon a set of facts even more analogous to those at bar. There the stevedores were engaged in unloading ore from the holds of the vessel onto railroad cars on the pier alongside the vessel. The booms and other tackle were so set that the cable from the winch, which had been furnished by the stevedore, was not long enough to extend into the wings of the vessel where the ore tubs had to be placed in the unloading operation. As the tub was lowered down and swung in toward the wing of the hold, the cable ran out its full length off the drum of the winch and then started to rewind as the drum kept revolving. As a result, the ore tub suddenly swung back across the hold and struck one of the longshoremen. The Court of Appeals held that the ship could not be held liable because

the unsafe condition resulted from the insufficient length of wire which had been rigged by the stevedore. The opinion of the Court of Appeals at this point shows (pp. 57-58):

"Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement [fol. 135] that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Laviho Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed."

This decision of the Court of Appeals was unequivocally reversed by the Supreme Court without oral argument in a per curiam decision (347 U.S. 984, 98 L. Ed. 1120).

These decisions of the Supreme Court, starting with the *Sieracki* case, decisively demonstrate that the ship is liable for injury to a longshoreman due to any unsafe condition [fol. 136] on the vessel, and it makes no difference whether the unsafe condition is created by, or even brought on board by the stevedores. In this respect, the longshoremen are in precisely the same position as the members of the crew.

The shipowner's duty to all seamen, including longshoremen, as well as members of the crew, is to supply and

maintain a seaworthy vessel, and this duty is "neither limited by conceptions of negligence nor contractual in character," and "is peculiarly and exclusively the obligation of the owner . . . one he cannot delegate." *Seas Shipping Co. v. Sieracki*, supra, at U.S. pp. 94-95. The shipowner's duty is to "supply and keep in order the proper appliances appurtenant to the ship" *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, at p. 104; *The Osceola*, 189 U.S. 158, 175.

Libellant's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and non-delegable* obligation to provide the longshoremen engaged in the ship's service with a safe and seaworthy vessel and equipment and that, consequently, *the shipowner is not free to nullify its responsibility for the breach of this duty by a parcelling out of its operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port, or by other devices which would strip the men performing its services of their historic protection.* Translated into the context of the case at bar, this means that irrespective of the convenience or [fol. 137] desires of the shipowner, the maritime law fastens upon him the responsibility for any defect, insufficiency or unsafe condition of the ship's gear, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. Whatever concurrent duty the law may impose upon these intermediary employers and whatever concurrent fault may be attributable to them, the shipowner's responsibility remains constant and unaffected. This proposition is spelled out in so many words by the Supreme Court in its landmark decision in *Seas Shipping Company v. Sieracki*, supra, which was the culmination of a long and troubled history in the field of litigation involving the rights of longshoremen against vessels by whom they were not employed but for whom they were performing work essential (sic) the vessel's enterprise, work which was formerly done by seamen who were members of the crew. Without reviewing it in detail here, it suffices to say that its history is punctuated by numerous attempts on the part of the shipowners to nullify and restrict the scope of their liability, and to shift to others

their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions: "refinements" which, as the Supreme Court aptly characterized it in a related connection, would "cut the heart from a protection to which they are wholly foreign in aim and effect." *Aguilar v. Standard Oil Company*, 318 U.S. 724 at 736. The Supreme Court in *Sieracki* pointed out (footnote 16, U.S. p. 98): "It is in relation to liability for personal injuries or death arising in the course of his employment on the ship that the policy of our law has been [fol. 138] most favorable to the stevedore's claims." This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relationship brought by the modern specialization in the maritime industry, *the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, and he is, therefore, entitled to the same protection as the members of the crew.*

The application of these established principles to the case at bar requires a holding in favor of libellant on the basis of this court's findings of fact. The very fact that the boom was rigged in such a fashion as to impose an abnormal and excessive strain upon the topping lift is, of itself, a finding that the vessel was unseaworthy. The shipowner's responsibility to furnish a safe place "*continues through any hazard created by longshoremen in loading the cargo . . .*" *Shields v. United States*, 175 F.2d 743. It is immaterial that the boom was improperly set by Nacirema. It is sufficient that it was in fact an unsafe condition and it follows from this fact alone that the ship must bear the responsibility for injuries to libellant resulting from that condition.

The Incompetence of the Stevedore Rendered the Vessel Unseaworthy

There is yet another aspect to this court's finding of fact. Implicit in that finding is the conclusion that Nacirema did not know how to rig the booms and was either unaware of or indifferent to the danger incident to the manner in which the boom was rigged. In either event, Nacirema's

[fol. 139] superintendents on the vessel did not measure up to the required standard as outlined in *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L. Ed. 354, i.e. that they were not "equal in disposition and seamanship to the ordinary men in the calling." In the *Boudoin* case, one member of the crew savagely assaulted and injured another crewman. The Supreme Court there held that the warranty of seaworthiness contemplated not only a safe and staunch vessel and appurtenances, but it required also that the vessel be manned by a complement capable of meeting the contingencies of the voyage. In relating the personnel on the vessel to the warranty of seaworthiness, the court said at pages 338-340:

"We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect . . . If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member.

"We do not intimate that Gonzales is a maniac nor that that extreme need be reached before liability for unseaworthiness arises. We do think that there was sufficient evidence to justify the District Court in holding [fol. 140] ing that Gonzales crossed the line, that he had such savage disposition as to endanger the others who worked on the ship. We think the District Court was justified in concluding that Gonzales was not equal in disposition to the ordinary men of that calling and that the crew with Gonzales as a member was not competent to meet the contingencies of the voyage. We conclude that there was evidence to support the cause of action for breach of the warranty of seaworthiness." (Emphasis supplied.)

Since the longshoremen, in fact, become servants of the ship and their services are an essential part of the ship's business, they are as much a part of the ship's personnel

as are the crewmen. It would be entirely inconsistent to say that a ship becomes unseaworthy because of a defective piece of equipment brought on board by the longshoremen, but not if the longshoremen themselves were defective. As the Supreme Court said in *Boudoin*, there is "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other."

In *West v. United States, et al.*, 246 F.2d 443, a longshoreman was engaged in repairing and fitting the vessel for sea when he was injured by a plug which fell from above in the engine room. It was contended on one hand that the plug was dropped by a fellow longshoreman, and on the other hand that it came out of an overhead pipe when the water pressure was turned on. Because the lower court had failed to make a decisive finding of fact in this respect, [fol. 141] the case was remanded back to the district court for that purpose, and in so doing Judge Goodrich, speaking for this court, said at page 444:

"If the plug was accidentally dropped by a fellow workman of Atlantic, that presents one set of problems. If the fellow workman intentionally dropped it then we have the question involved, perhaps, in *Boudoin v. Lykes Bros. S.S. Co.*, 1955, 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354."

In the case at bar, the stevedore, according to the opinion of the court, rigged the boom in such a dangerous manner as to make inevitable the breaking of the topping lift upon the application of a strain within the contemplation of the ship's work. It follows from the court's finding that the stevedore was incompetent because it did not know the danger inherent in so rigging the boom, and in this respect it was not equal in *seamanship* to ordinary men in the calling. In either event, the vessel must be deemed unseaworthy.¹

¹ The incompetence of the stevedore was pleaded in par. 8 of the libel: "in that claimants and respondents allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said ship" (App. 8a-9a).

This court should, therefore, have affirmed the judgment in favor of libellant against the vessel, notwithstanding this court's rejection of the lower court's finding that the winch was unseaworthy.

[fol. 142] This Court Erred in Overruling the
Fact Finding of the Court Below

Apart from the foregoing considerations, it is clear that this court erred in its mathematical calculations in overruling the fact finding of the court below that the cut-off device in the winch was set at an unsafe level and that this was a contributing factor to the accident. This error arose from two incorrect assumptions which this court used in its mathematical computations: (a) that the setting of the cut-off device was in conformity with a Coast Guard standard;² and (b) that the topping lift had a capacity of fifteen tons instead of three tons.

The setting of the cut-off device in this case was not in conformity with the Coast Guard regulation, but, on the contrary, it exceeded the allowable limits under that regulation by at least fifty per cent of the safe working load. The regulation provides that the circuit breaker in motors (not winches) of not more than fifty horsepower shall be set at a maximum of 250 per cent of *full-load current* (not of weight of load being lifted). Respondent's expert, Foley, testified that this meant that the circuit breaker would shut off the power in the motor when the weight of the load reached a level of fifty per cent over the rated

² There was no specific Coast Guard regulation introduced or referred to in the evidence. Respondent's witness, Foley, in answer to a question as to what the maritime regulations were regarding the level at which the circuit breaker should be set, stated *250 per cent of full load current* (not of the load being lifted). Only after the argument on this appeal did respondent refer the court to a specific Coast Guard regulation (46 C.F.R. Part 111.45-20(b2)). That regulation does not refer to ships' winches and we have not been able to find any regulation pertaining to ships' winches. Upon inquiry, at the Coast Guard, we were referred to the Maritime Administration which prepares the plans and is responsible for building the ships. Those authorities advised that there are no regulations covering the setting of circuit breakers or cut-off devices relating to the motors in ships' winches.

[fol. 143] capacity of the winch. In this case, he stated, if the circuit breaker had been set at 250 per cent of the full load current, where the rated capacity of the winch was three tons, a *load of between four and four and one-half tons* being lifted by the winch would trip the circuit breaker and shut off the power (R. 1976-1980).

Respondent's witness, Foley, made it very clear that the percentage of overload in the Coast Guard regulation referred to the current coming from the motor and not the weight being lifted (R. 1978). Respondent's Captain Peters, with full knowledge of the technical features of this problem and being especially well qualified regarding the actual setting of the circuit breaker, for he supervised the construction of the ship (R. 737-738), testified that the cut-off device was set to go off when the *load being lifted was more than six tons*, and he admitted that it was more than twice the safe working load of the ship's tackle (R. 920, 922-923).

It follows from this testimony that the setting of the circuit breaker was more than fifty per cent above the limit contemplated in the Coast Guard regulation, if that regulation be applicable at all. If the cut-off had been set within the limits of the regulation, it would not have exceeded a load of four and one-half tons. Since it was actually set to lift a load of more than six tons, it was a substantial violation of the regulation, as well as a violation of the proper and standard practice, as the court below found, which was a substantial contributing factor to the accident.

[fol. 144] This court's mathematical computation was also based upon a highly erroneous conception of the strength and capacity of the hoisting gear. The opinion states that the hoisting gear here involved "is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three-ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage." This finding is not only factually incorrect, but it is contrary to

universally recognized principles relating to factors of safety in the manufacture of products.

This court assumed that because the cable here had a factor of safety of five times its rated safe working load, it had a capacity or was capable of hoisting five times that load. That assumption is fallacious because the factor of safety does not mean that it has a capacity of five times the safe working load, but only that the cable would not be expected to *break* until the strain upon it reached five times the safe working load. In the manufacture of all products requiring a factor of safety, the product must be tested to destruction in order to determine the breaking point. This means that before the point of destruction is reached there necessarily must be progressive and irreversible damage done to the product before it reaches the point of breaking. In order to determine the safe working load or capacity of the product, it becomes necessary to go back from the breaking point to a point before the strain begins to impose a progressive and irreversible damage. If the strain on the product were permitted to exceed the [fol. 145] safe working capacity of the product it would mean that every time the product is used it would suffer more damage progressively until it reaches the point where it would fail even though the strain on the last occasion was within normally permissible (sic) limits. It is precisely to prevent this progressive damage that the factor of safety is designed to keep the safe working load below the level of progressive permanent damage. While a product may continue to function where the strain exceeds the safe working level but is within the limits of the factor of safety, the product, nevertheless, becomes weaker and, while it may not break on that occasion, a series of such successive strains necessarily weakens the product and successively lowers the factor of safety. The breaking point may thus be reduced to a level well within the supposedly safe working load.

It was, therefore, incorrect to say, as this court did here, that the cable which had a rated safe working capacity of three tons was "adequate to withstand a strain of fifteen tons," and that, therefore, a strain of six tons, or twice the safe working load, "did not in itself create any undue

risk of breakage." The very fact that the manufacturer of the cable designated three tons as the maximum working load for the cable evidences that the manufacturer did not intend a strain of more than three tons to be imposed on the product. Should we assume for the moment that the cable broke while under a strain of six tons, would a suit lie against the manufacturer where the cable expressly was limited to three tons? Suppose the three-ton cable was used repeatedly for a six ton load. Would a cause of action lie against the manufacturer? If it is permissible (sic) to exceed the safe working load at all, why would [fol. 146] it not be permissible (sic) to go to the extreme limit of fifteen tons? The rationale of this court's decision permits exactly that.

It is suggested that in order to lift a load of three tons it is necessary to impose a strain of more than three tons. While this is undoubtedly true, it does not justify putting a strain of more than three tons on a three-ton cable. The answer would appear to be that if a load of three tons is to be lifted and a strain of four and one-half tons is required to lift it, then the cables and other tackle should have a safe working capacity of four and one-half tons and not three tons. Anything less than four and one-half ton cable, under those circumstances, renders the vessel unseaworthy.

Under the circumstances, since the safe working load of the cables was three tons, the cut-off device should have been set so as not to exceed that maximum.

The trial judge was clearly right in holding that the cut-off device was set at an excessive level and that this rendered the vessel unseaworthy.

Even if we accept the testimony of respondent's witnesses that the position of the boom as rigged by Nacirema imposed a strain on the topping lift of three or four times greater than the load being lifted, the accident would, nevertheless, have been avoided if the cut-off had been set at the safe working load of three tons. Had it been so set, the maximum strain on the cable would have been between nine and twelve tons, well within the factor of safety, if [fol. 147] the cable had its full factor of safety. This, of course, may have weakened the cable, but it should not

have broken. The accident is thus traceable to the excessive setting of the cut-off device even on the basis of respondent's calculations.

The decision of the trial judge on the question of the ship's liability to libellant should have been affirmed.

CONCLUSION

The decision and reasoning of this court bring into play new issues which counsel did not contemplate in the original briefing and argument of the case. Aside of the fact that the decision will have the most serious consequences upon libellant, who is totally and permanently disabled as a result of the accident, the issues raised by this court's opinion will have a tremendous impact upon the admiralty law relating to the liability of the shipowner for unsafe conditions created by the stevedores and for the incompetency of the stevedores. Moreover, this court's interpretation regarding the factor of safety of materials and exceeding the safe working limits of materials will have an equally great impact in all industries including the maritime industry. Before creating such precedents, it is submitted that this court avail itself of the privilege of requiring full arguments of counsel upon the precise issues raised by its decision and opinion which have not heretofore been presented and argued.

[fol. 148] The interests of justice require that a rehearing be granted.

Respectfully submitted,

Abraham E. Freedman, Sidney A. Brass, Counsel
for Libellant.

[fol. 149]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138

No. 12,139

No. 12,140

JOHN H. CRUMADY, Appellant in No. 12,138,

v.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc.,
and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,
Respondents,

v.

NACIREMA OPERATING Co., INC., Impleaded
Respondent-Appellant in No. 12,140.

HENDRIK FISSER AKTIEN GESSELLSCHAFT,
Claimant-Appellant in No. 12,139.

ON PETITION FOR REHEARING

Before Biggs, Chief Judge, and Maris, Staley and Hastie,
Circuit Judges.

OPINION OF THE COURT—Filed December 5, 1957

Per Curiam:

A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied.

[fol. 150] Biggs, Chief Judge, dissenting.

My brother Hastie's succinct opinion expressing the majority view as to why the accident to Crumady occurred raises an issue which requires rehearing before the court *en banc*. The majority opinion correctly concludes that Crumady was injured because a seaworthy boom, topping lift and tackle were employed to lift cargo from the vessel's hold but because the boom and topping lift were wrongly positioned by the stevedoring crew too great a strain was put on the boom and topping lift causing the topping lift to break.

Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), *aff'd per curiam* 347 U.S. 396 (1954), held that the responsibility of the ship owner was not shifted to the stevedoring crew because that crew brought on board and made use of a defective block which caused Petterson's injuries. The Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956), held that where longshoremen placed a seaworthy, but wrong, hatch-cover over a "pad-eye", and thereafter a longshoreman stepped on the hatch-cover which gave way under him, causing him serious injuries, the ship was liable. In the case at bar, it would appear that a logical and necessary extension of the principles enunciated in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), and in Petterson, would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a "seaworthy" round peg placed in a "seaworthy" square hole will render the whole unseaworthy. While it does not appear how long a time elapsed between the positioning of the boom and the topping lift and the occurrence of the accident in the case at bar, it is clear that some time necessarily elapsed.

[fol. 151] For these reasons I conclude that rehearing should be had before the court *en banc*.

[fol. 152]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,138; 12, 139

JOHN H. CRUMADY, Appellant in No. 12,138,

vs.

JOACHIM HENDRIK FISSER, her engines, tackle, apparel, etc.,
and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

vs.

NACIREMA OPERATING CO., INC.
HENDRIK FISSER ARTIEN (sic) GESSELSCHAFT,
Appellant in 12,139.

ORDER DENYING PETITION FOR REHEARING—December 5, 1957

Present: Biggs, Chief Judge, and Maris, Staley and
Hastie, Circuit Judges.

After due consideration the petition for rehearing in the
above-entitled case is hereby denied.

Dated: December 5, 1957

[fol. 153] Clerk's Certificate to foregoing transcript (omit-
ted in printing).

[fol. 154]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—February 27, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be; and the same is hereby, extended to and including May 2, 1958.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 27th day of February, 1958.

[fol. 155]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—March 1, 1958

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 2, 1958, without thereby affecting the determination of the timeliness of this application.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 1st day of March, 1958.

[fol. 156]

SUPREME COURT OF THE UNITED STATES

No. 968, October Term, 1957

JOHN H. CRUMADY, Petitioner,

vs.

"JOACHIM HENDRIK FISSE", her Engines, Tackle, Apparel,
etc., JOACHIM HENDRIK FISSE, et al.

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 971 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 157]

SUPREME COURT OF THE UNITED STATES

No. 971, October Term, 1957

"JOACHIM HENDRIK FISSE", her Engines, Tackle,
Apparel, etc., Petitioner,

vs.

NACIREMA OPERATING CO., INC.

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 968 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.

FILED

APR 30 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 8561

JOHN H. CRUMADY,

Petitioner,

v.

JOACHIM HENDRIK FISSHER, Her Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISSER, and/or HENDRIK FISSER,

Respondents,

v.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

ABRAHAM E. FREEDMAN,

SIDNEY A. BRASS,

**1415 Walnut Street,
Philadelphia 2, Pa.,**

Counsel for Petitioner.

TABLE OF CONTENTS OF BRIEF.

	Page
OPINIONS OF THE COURTS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT	6
<p>First Point: The Decision of the Court Below Violates the Rule Laid Down by This Court in <i>Petterson v. Alaska S. S. Co.</i>, 347 U. S. 396; <i>Rogers v. U. S. Lines</i>, 347 U. S. 984; <i>Seas Shipping Company v. Sieracki</i>, 328 U. S. 85; and <i>Pope and Talbot v. Hawn</i>, 346 U. S. 406, and It Is in Direct Conflict With the Decision of the Court of Appeals for the Second Circuit in <i>Grillea v. United States</i>, 232 F. 2d 919, All of Which Hold to the Basic Maritime Principle That a Shipowner May Not Circumvent His Absolute and Non-Delegable Duty With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Stevedore Contractor the Responsibility of Providing, Rigging and Maintaining the Ship's Gear</p>	
The Conflict Between the Court Below and the Court of Appeals for the Second Circuit	6 17
<p>Second Point: The Court of Appeals Reversed the Findings of the Trial Court Without Applying the Standard That Such Findings Must Be Clearly Erroneous Upon a Review of the Entire Record</p>	
CONCLUSION	21 28
APPENDIX	29
Opinion of the Court	29
Judgment	35
Opinion of the Court on Petition for Rehearing	36
Order Sur Petition for Rehearing	37

TABLE OF CASES CITED.

	Page
Aguilar v. Standard Oil Co., 318 U. S. 724	7
Atlantic Transport Co. v. Imbroke, 234 U. S. 52, 58 L. Ed. 1208	7, 8
Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441 (CA 1)	21
Brabazon v. Belships Co., 202 F. 2d 904 (C. A. 3)	12, 13
C. J. Dick Towing Co. v. The Leo, 202 F. 2d 850 (CA 5) ..	21
The Dredge No. 15, 264 F. 135	10
Glover v. Compagnie Generale Transatlantique, 103 F. 2d 557 (C. A. 5)	9
Grillea v. United States, 232 F. 2d 919	5, 6, 11, 18, 20
Grillo v. Royal Norwegian Government, 139 F. 2d 237 (C. A. 2)	11, 17
International Stevedoring Co. v. Haverty, 272 U. S. 50, 71 L. Ed. 157	7
Kochler v. United States, 187 F. 2d 933 (CA 7)	21
Larsen v. United States, 72 F. Supp. 137	18
Lauro v. United States, 162 F. 2d 32	17
Lynch v. United States, 163 F. 2d 25, cert. den. 326 U. S. 743	17
Mahnich v. Southern Steamship Co., 321 U. S. 96, 88 L. Ed. 661	9, 10, 16
McAllister v. United States, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6	21, 22
The Nako Maru, 1938 AMC 770 (E. D. Pa.), reversed on other grounds in 101 F. 2d 716, cert. den. 307 U. S. 641	9
The No. 34, 25 F. 2d 602 (C. A. 2)	9
The Omsk, 266 F. 200 (C. A. 4)	9
The Osceola, 189 U. S. 158	9, 10, 16, 17
Pacific American Fisheries v. Hoof, 291 F. 306, cert. den. 263 U. S. 712	10

TABLE OF CASES CITED (Continued).

	Page
Petterson v. Alaska S. S. Co., 205 F. 2d (aff'd per curiam)	
347 U. S. 396	5, 6, 11, 14, 18, 20
Pope & Talbot v. Hawn, 346 U. S. 406	6, 12, 16, 18, 20
Read v. United States, 201 F. 2d 758 (C. A. 3)	12
Rich v. United States, 177 F. 2d 688 (C. A. 2)	11
Rogers v. U. S. Lines, 347 U. S. 984	6, 13, 14, 18
The H. A. Scandrett, 87 F. 2d 708	9
Seas Shipping Company v. Sieracki, 328 U. S. 85, 90 L. Ed.	
1099	5, 6, 7, 9, 10, 12, 16, 17, 18, 20
Shields v. United States, 175 F. 2d 743	11
The Spokane, 294 F. 242 (C. A. 2), cert. den. 264 U. S. 583 ..	9
Standard Oil Co. v. Robins Drydock & Repair Co., 25 F. 2d	
339	18
Sutherland v. Buckeye Cotton Oil Co., 259 F. 909	10
The Joseph B. Thomas, 86 F. 658 (C. A. 9)	9
Union Carbide & Carbon Corp. v. United States, 200 F. 2d	
908 (CA 2)	21
Uravic v. Jarka Co., 282 U. S. 234, 75 L. Ed. 312	7

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Coast Guard Regulation 46 C. F. R. Part 111.45-20 (b2)	23
Rule 52(a) of the Federal Rules of Civil Procedure	21
28 U. S. C. Sec. 1254(1)	2

IN THE
Supreme Court of the United States.

October Term, 1958. No.

JOHN H. CRUMADY,

Petitioner,

v.

**JOACHIM HENDRIK FISSER, HER ENGINES, TACKLE,
APPAREL, ETC., AND JOACHIM HENDRIK FISSER,
AND/OR HENDRIK FISSER,**

Respondents,

v.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner, John H. Crumady, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on September 30, 1957, reversing the judgment of the District Court of the United States for the District of New Jersey, in the appeal docketed in the said Court of Appeals as No. 12,139, and the order of the said court denying rehearing entered on December 5, 1957.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of New Jersey is reported at 142 F. Supp. 389 (Appellant's Appendix in Appeal No. 12,138, p. 16a). The opinion of the Court of Appeals for the Third Circuit is recorded in 249 F. 2d 818 (*infra*, p. 29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 F. 2d 821 (*infra*, p. 36).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 30, 1957 (*infra*, p. 35). The order denying rehearing was entered on December 5, 1957 (*infra*, p. 37). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a shipowner engages a stevedore contractor to unload the ship's cargo, and said stevedore, in order to conduct the unloading operation, rigs the ship's gear in an improper, unseaworthy manner, as a result of which a cable breaks while the cargo is being unloaded, causing the boom to collapse and injure one of the longshoremen, can the shipowner escape liability because the dangerous instrumentality which caused the accident was rigged by the stevedore?

2. Where the findings of the trial judge are based on competent and substantial evidence, may the Court of Appeals reverse such findings by substituting its own judgment for that of the trial judge without a holding or showing that the findings are clearly erroneous?

STATEMENT OF THE CASE.

Petitioner, a longshoreman, was assisting in unloading a cargo of lumber from respondents' vessel, when one of the cables supporting the boom broke, causing the boom to fall upon petitioner and crush him to the deck, inflicting serious and grievous injuries. He brought this action in admiralty against the vessel and her owners, claiming that his injuries resulted from defective equipment and the negligence of the respondents. The vessel thereupon impleaded the stevedoring contractor as third party respondent.

The undisputed facts as found by the courts below disclose:

The respondent vessel "Joachim Hendrik Fisser" arrived in Port Newark, New Jersey, on January 2, 1954, with a cargo of lumber, and employed the Nacirema Operating Company, Inc., a stevedoring contractor, to discharge the lumber from the vessel. Before the operation during which the petitioner was injured, the stevedores set the boom and tackle in such position that, during the hoisting operation, a greater strain was imposed upon the cable that secured the boom to the mast than was imposed upon the other cables. All of the gear, including the boom and the cables and electric winch which supplied the power, had a rated safe work load capacity of *three tons*. The winch was equipped with a device which could shut off the power whenever the load being lifted exceeded any specified weight. The trial court found that this device had been improperly set by the vessel operators to cut the power in the winch when the load being lifted exceeded *six tons*, or twice the safe working load of the gear lifting the load. Prior to the accident, the stevedores were in the course of hoisting two timbers from a hold of the vessel, when one end of the timbers became wedged and caught under the hatch coaming. As the power in the winch increased the strain on the cables pulling the load, the cut-off device failed to shut off the power within the safe working limits of the gear, and the

increasingly excessive strain finally caused the topping lift to break. As a result, the boom fell upon the longshoreman.

The trial judge found from the evidence of lay and expert witnesses that the topping lift broke while it was under an excessive strain of 17 to 21 tons; that the winch was unseaworthy because the cut-off device was set at an excessively high level and placed an undue strain upon the working gear, far beyond its rated safe working capacity; that this factor combined with the unseaworthy condition of the rigging to cause the accident (App. 33a-35a). The trial court, accordingly, held the vessel liable to petitioner, and, further, held the impleaded respondent, Nacirema, liable over the vessel because of its defective rigging of the gear (App. 35a).

Nacirema appealed from the judgment against it, and the vessel then cross appealed from the judgment in favor of petitioner. The judgment in favor of petitioner was reversed by the Court of Appeals upon the ground that, although the cut-off device in the winch was set to shut off the power when the load was more than twice the safe rated capacity of the gear, this did not render the winch unseaworthy because the gear was assumed to have a factor of safety of five times its rated safe working capacity. Reasoning from this, the lower court, in conflict with all the evidence, said that the gear actually had a working capacity of fifteen tons and not merely three tons, the officially rated maximum safe working capacity.¹ Accordingly, the court reasoned further, a strain of six tons, twice the safe rated working capacity, "did not in itself create any undue risk of breakage." The Court of Appeals then concluded that

1. There is no evidence in the entire record to support this unique holding of the court below, inferentially or otherwise. All of the experts, including respondents', testified that the factor of safety refers to the breaking point of the gear and not its working capacity. Obviously, if the gear should be strained beyond its safe working load, as it approaches the breaking point irreversible changes take place. Such deterioration reduces the factor of safety and lowers the breaking point. All the evidence in the record contradicts the finding that the cable had a safe working capacity of fifteen tons.

the *sole* cause of the accident was the defective rigging. Since this had been set by the stevedores, the court completely exonerated the vessel.

Petitioner moved for rehearing upon the ground that the vessel must be held liable even if the sole cause of the accident was the defective rigging, regardless of whether it had been set by the longshoremen, because of the non-delegable duty owed by the vessel to the longshoremen. The majority of the court below dismissed this contention as being without merit and without further comment. Chief Judge Biggs dissented upon the ground that the shipowner should have been held liable for the defective condition of the rigging, even though it had been set by the longshoremen, under the rulings of this court in *Petterson v. Alaska S. S. Co.*, 205 F. 2d, aff'd per curiam 347 U. S. 396, and *Seas Shipping Company v. Sieracki*, 328 U. S. 85, and the holding of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First Point: The Decision of the Court Below Violates the Rule Laid Down by This Court in *Petterson v. Alaska S. S. Co.*, 347 U. S. 396; *Rogers v. U. S. Lines*, 347 U. S. 984; *Seas Shipping Company v. Sieracki*, 328 U. S. 85; and *Pope and Talbot v. Hawn*, 346 U. S. 406, and It Is in Direct Conflict With the Decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, All of Which Hold to the Basic Maritime Principle That a Shipowner May Not Circumvent His Absolute and Non-Delegable Duty With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Stevedore Contractor the Responsibility of Providing, Rigging and Maintaining the Ship's Gear.

Petitioner's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and non-delegable* obligation to provide the longshoremen engaged in the ship's service with a safe and seaworthy vessel and equipment, and that, consequently, *the shipowner is not free to nullify his duty by parcelling out his operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port*, or by other devices which would strip the men performing its service of their historic protection. Translated into the context of the case at bar, this means that irrespective of the convenience or desires of the shipowner, the maritime law fastens upon him the responsibility for any defect, insufficiency or other unsafe condition of the unloading gear necessary to carry out the ship's enterprise, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. *Whatever concurrent duty the law may impose upon these intermedi-*

ary employers, and whatever concurrent fault may be attributable to them, the shipowner's responsibility remains constant and unaffected. This proposition is spelled out in so many words by this court in its landmark decision in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, which was the culmination of a long and troubled history in the field of litigation involving the rights of longshoremen against vessels by whom they were not employed, but for whom they were performing work essential to the vessel's enterprise, work which was formerly done, in the main, by seamen who were members of the crew. Without reviewing it in detail here, suffice it to say that its history is punctuated by numerous attempts on the part of the shipowners to nullify and restrict the scope of their liability, and to shift to others their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions: "refinements" which, as this court aptly characterized in a related connection, "cut the heart from a protection to which they are wholly foreign in aim and effect." *Aguilar v. Standard Oil Co.*, 318 U. S. 724, at 736. The attempts have generally failed before this court, and before those federal appellate courts which rightly gauged the trend and policy of the decisions preceding *Sieracki*, particularly the decisions in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208; *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157; and *Uravic v. Jarka Co.*, 282 U. S. 234, 75 L. Ed. 312. As this court pointed out in *Sieracki*, (footnote 16, U. S. p. 98, L. Ed. p. 1108):

"It is in relation to liability for personal injury or death arising in the course of his employment on the ship that the policy of our law has been most favorable to the stevedore's claims."

This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relation-

ship brought about by modern specialization in the maritime industry, the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, is subject to the same risks and hazards as are the members of the crew, and is as helpless to discover and avoid them; he is therefore entitled to the same protections so far as these are consistent with his relation to the vessel. This policy is predicated upon the further explicit recognition that any toleration of division of responsibility as between the ship and those intermediary employers who undertake to perform portions of the ship's work will result, in the first instance, in a progressive evasion of responsibility, and ultimately may leave the injured longshoreman without relief altogether.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrovek, supra*, 234 U. S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally applicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these phases of the vessel's enterprise. In so doing the shipowner did not relieve himself of his traditional obligations. For these men, though not members of the crew, were doing precisely the work of the crew, as necessary to

the accomplishment of the ship's enterprise as navigation itself. Rightly, these men looked to the vessel for the safe accomplishment of their work; safe in a comparative sense, only, for, as graphically expressed in *The H. A. Scandrett*, 87 F. 2d 708, 711: "A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put." No one is in a better position than the vessel to take such proper and adequate means to reduce the hazard as the nature of the instrumentality, and the enterprise in which she is engaged, will reasonably allow. As this court said in *Sieracki, supra* (U. S. p. 94, L. Ed. pp. 1104-06): "Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its costs." Thus it is that it has been the ship-owner's traditional responsibility to provide those engaged in the ship's service, whether members of the crew or not, with a safe and seaworthy vessel—a duty which embraces within its scope a safe place for the performance of the work,² as well as to supply and keep in order proper equipment for its execution.³

Nor has the present stage of maritime practice of hiring so-called independent contractors, who, in turn, are technically the employers of the men who now perform certain phases of the ship's work, altered the legal incidents of the underlying relationship in the slightest degree. The ship-owner's traditional obligation remains, and he cannot insulate his liability for its breach by the device of an intermediate employer, for the obligation is non-delegable. The

2. *The Joseph B. Thomas*, 86 F. 658, 660 (C. A. 9); *The No. 34*, 25 F. 2d 602, 604 (C. A. 2); *The Spokane*, 294 F. 242, 255 (C. A. 2), cert. den. 264 U. S. 583; *The Omsk*, 266 F. 200, 202 (C. A. 4).

3. *Glover v. Compagnie Generale Transatlantique*, 103 F. 2d 557 (C. A. 5); *The Nako Maru*, 1938 AMC 770 (E. D. Pa.), reversed on other grounds in 101 F. 2d 716, cert. den. 307 U. S. 641; *Mahnich v. Southern Steamship Co.*, 321 U. S. 96, 88 L. Ed. 661; *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764.

device is of benefit primarily to the shipowner, who derives the advantages of specialized skill without increasing his maritime obligations. There are no reasons of policy to dilute these obligations nor any considerations of equity which could possibly serve as a basis for permitting the shipowner to thus slough off his responsibilities.

That the shipowner finds it commercially expedient to farm out various longshore operations involved in a vessel's enterprise is understandable. To permit him, on this account, to escape his traditional responsibilities to the men who perform the ship's work would be indefensible:

" . . . he is at liberty to conduct his business by securing the advantage of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do." (Emphasis supplied.) *Seas Shipping Co. v. Sieracki*, supra, 328 U. S. 85, 100, 90 L. Ed. 1099, 1109.

The shipowner's obligation to supply a seaworthy vessel and safe and seaworthy appliances is absolute and non-delegable. *Seas Shipping Co. v. Sieracki*, supra; *Mahnich v. Southern Steamship Company*, supra; *Sutherland v. Buckeye Cotton Oil Co.*, 259 F. 909. It is likewise continuing in character. As this court pointed out in the *Mahnich* case, supra, at U. S. p. 104, L. Ed. p. 567, quoting from *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764, the owner's obligation is to "supply and keep in order the proper appliances appurtenant to the ship." (Emphasis in the original.) See also *Pacific American Fisheries v. Hoof*, 291 F. 306, cert. den. 263 U. S. 712; *The Dredge No. 15*, 264 F. 135.

The sole basis upon which the holding of the lower court exonerating the shipowner rests is that the shipowner temporarily surrendered *control* of the vessel to the intermediate employer. To allow the "control" theory would require a holding that although the obligation is non-delegable, it may nevertheless be delegated to intermediary employers; and that although the obligation of the owner is to *supply* as well as to *keep in order* the appliances appurtenant to the ship, this obligation ceases at the very moment when it becomes most necessary, that is to say, at the very moment when the ship and its appliances must be used for the purposes for which they are intended. Under the "control" theory the shipowner is thought to be relieved from the obligation solely and precisely for the asserted reason that during the time the intermediary employers are working aboard the ship he is deprived of control over the vessel and its appliances: that the intermediary employer's "control" during these operations is such that it completely divests the owner of the ability to meet his obligations. Yet, had a member of the crew been injured under the circumstances here disclosed, instead of the petitioner, the shipowner's liability would have been clear for "*The shipowner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo. . . .*" *Shields v. United States*, 175 F. 2d 743. This doctrine has been, in fact, equally applied to longshore workers: *Grillo v. Royal Norwegian Government*, 139 F. 2d 237 (C. A. 2); *Rich v. United States*, 177 F. 2d 688, 691 (C. A. 2); *Petterson v. Alaska S. S. Co.*, supra; *Grillea v. U. S.*, 232 F. 2d 919. The truth of the matter is that both in fact as well as in contemplation of law, dominant control over the ship and its activities remains in the shipowner precisely because as to all matters relating to the ship's enterprise the right as well as the duty of ultimate management and control are firmly and irrevocably lodged in the shipowner. While a measure of control over the unloading gear was undoubtedly possessed by Nacirema in the sense

that its employees were handling it at the time of the accident, this is not the type of control that can legally divest the shipowner of his paramount and ultimate right of exclusive control, nor of the non-delegable obligations incident thereto. The test is not whether, in the particular instance, control is actually exercised by the ship, but whether the right of control exists.

This principle, as outlined in the *Sieracki* case was again attacked in *Pope & Talbot v. Hawn*, 346 U. S. 406, upon the ground that the longshoremen were not entitled to the same status as the seamen, who are members of the crew. This court in the *Hawn* case unequivocally rejected this further attempt to create a distinction between the members of the crew and the longshoremen, stating (U. S. p. 412, L. Ed. p. 152):

"We are asked to reverse this judgment by overruling our holding in *Seas Shipping Co. v. Sieracki* (US) *supra*. *Sieracki*, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. *That identical argument is repeated here. We reject it again and adhere to Sieracki.*" (Emphasis supplied.)

Following the *Sieracki* and *Hawn* decisions, a number of conflicting decisions were rendered by the Courts of Appeals for the Second and Third Circuits. In *Read v. United States*, 201 F. 2d 758 (C. A. 3), the vessel was held liable to a longshoreman under the shipowner's non-delegable duty, despite the fact that under a contractual arrangement the duty to supply lighting facilities had been "delegated" to the longshoreman's employer. In *Brabazon v. Belships*

Co., 202 F. 2d 904. (C. A. 3) a longshoreman was injured in the hold of the vessel when a board upon which he was walking collapsed. The board was not supplied by the ship and its origin was undetermined. The court rejected the shipowner's principal contention (202 F. 2d at 906) "that the hold having been safe when loading operations began, the shipowner thereafter has no affirmative responsibility whatever for shipboard hazards not of his own creation that may come into existence in the independent contractor's work area during the course of loading," and imposed responsibility on the vessel. The Court held that even as to liability for negligence the stated circumstances do not operate as a general rule of absolution from responsibility. The same Court of Appeals, however, reached a different conclusion in *Rogers v. U. S. Lines*, supra 205 F. 2d 57, a case very similar to the one at bar. There the stevedores were engaged in unloading ore from the holds of the vessel onto railroad cars on the pier alongside. The booms and other tackle were so set by the stevedores that the cable from the winch, which had been furnished by the stevedore, was not long enough to extend all the way into the wings of the ship. As the ore tub was lowered down and swung in toward the wings, the cable ran out its full length and then started to rewind as the drum of the winch kept revolving. This caused the tub to swing back across the hold, striking and seriously injuring one of the longshoremen. The Court of Appeals for the Third Circuit held that the ship could not be liable because the cable which was not long enough had been furnished and rigged by the stevedore. The opinion of the Court of Appeals, which was reversed by this court without opinion at 347 U. S. 984, discloses unsound reasoning as follows (pages 57-58):

"Admittedly then, the alleged unseaworthy condition was not created by the ship. *The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading*

operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with the other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed."

This court reversed that decision per curiam without opinion on the same day that it affirmed the decision of the Court of Appeals for the Ninth Circuit in *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396. The Court of Appeals has again committed exactly the same error in the case at bar as it did in the *Rogers* case.

This court's decision in *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396, is likewise in square conflict with that of the court below. There the stevedores brought on board certain of their own gear, including a defective block, and rigged it along with the ship's equipment for the unloading operation. The block broke in the course of discharging the cargo, causing injury to one of the longshoremen. The question before the court was whether or not the ship was responsible for the unsafe condition of the gear as rigged by the stevedores. In that case, as in the *Rogers* case, the shipowner interposed the "relinquishment of control"

defense, contending that once he had provided a seaworthy ship to the stevedores, he could not be held liable for any unsafe conditions thereafter occurring. The Court of Appeals for the Ninth Circuit, in considering this issue, said (p. 479):

"Appellee argues that even if the unseaworthiness of the block is shown, it is not liable because control of that portion of the ship upon which Petterson was working had been surrendered to Stevedoring Co. In so contending they rely, as did the court below in its decision, upon the 'relinquishment of control' doctrine which has been adopted in the Second and Third Circuits. That doctrine is that a shipowner is under an initial duty to provide a seaworthy ship; but that this duty is a concomitant of control, and the shipowner is not liable for unseaworthiness which arises after control of the ship, or that part which includes the unseaworthy condition, has been surrendered to the stevedores."

. . .

(P. 480)

"Judge Hand was correct in his interpretation of the Sieracki case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.' 328 U. S. at page 99, 66 S. Ct. at page 879. *The duty of the shipowner* is described, 328 U. S. at page 95, 66 S. Ct. at page 877, as 'a form

of absolute duty owing to all within the range of its humanitarian policy' and further, 328 U. S. at page 100, 66 S. Ct. at page 880, as '*peculiarly and exclusively the obligation of the owner. * * * one he cannot delegate.*' It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner *pro hac vice*." (Emphasis supplied.)

Regarding the so-called "relinquishment of control doctrine" the court went on to say (p. 480):

"That this absolute duty is also owed to stevedores is clearly shown by the *Sieracki* case. See also *Kulukundis v. Strand*, 9 Cir., 202 F. 2d 708, 710. The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here." (Emphasis supplied.)

That decision was affirmed *per curiam* by this court upon the authority of *Seas Shipping Company v. Sieracki*, *supra*, 328 U. S. 85, and *Pope and Talbot v. Hawk*, 346 U. S. 406.

This court in the *Petterson* and *Rogers* cases, thus, again rejected the further attempt to drive a wedge between the seaman and the longshoreman in connection with the shipowner's duty under the warranty of seaworthiness. Implicit in those two decisions of this court is the proposition that longshoremen are assimilated to the position of seamen and they share equally the full benefits of the warranty of seaworthiness. The shipowner's duty is to "supply and keep in order the proper appliances appurtenant to the ship." *Mahnich v. Southern Steamship Co.*, *supra*, at U. S. page 104; *The Osceola*, 189 U. S. 158, 175.

This duty is neither limited by concepts of negligence nor contractual in character, and "is peculiarly and exclusively the obligation of the owner. . . . one he cannot delegate." *Seas Shipping Company v. Sieracki*, *supra*, at U. S. pp. 94-95, 100.

The decision of the court below in the instant case is directly contra to the foregoing decisions and principles. It is undisputed that the condition of the rigging was unsafe. Indeed, the Court of Appeals held that the accident resulted from the unsafe condition of the rigging. The Court of Appeals should, therefore, have affirmed the decision of the trial court upon this fact alone, since the shipowner cannot be insulated from liability because this unsafe condition was created by the stevedores. The shipowner's duty in this respect is non-delegable.

The Conflict Between the Court Below and the Court of Appeals For the Second Circuit.

Prior to the *Petterson* decision, there was a lack of consistency in the decisions of the Second Circuit, as there was in the Third. In one line of cases, the court held that the shipowner's obligation of seaworthiness was limited to providing an initially seaworthy vessel which terminated the moment "control of the vessel was surrendered to the stevedore." *Lynch v. United States*, 163 F. 2d 25, cert. den. 326 U. S. 743; *Lauro v. United States*, 162 F. 2d 32. Opposed to these cases is the opinion of Judge Learned Hand in the *Lauro* case where although concurring in the result because the ship was initially unseaworthy, he expressed the same conviction that under the decision of this court in *Seas Shipping Company v. Sieracki*, *supra*, and *The Osceola*, *supra*, the shipowner's duty continues throughout the period the stevedores are aboard the vessel. Consistent with this view is the Second Circuit decision in *Grillo v. Royal Norwegian Government*, 139 F. 2d 237, where the sole defense to a longshoreman's

action for personal injuries, sustained because of a defective ladder over the ship's side, was that the ladder was not shown to have been part of the gear or to have been placed there by any authorized person on behalf of the ship. That defense was rejected. See also *Standard Oil Co. v. Robins Drydock & Repair Co.*, 25 F. 2d 339, and *Larsen v. United States*, 72 F. Supp. 137.

Following the *Petterson* and *Rogers* decisions the Court of Appeals for the Second Circuit consistently conformed to the principles of those cases. The specific subject matter was again presented to the Second Circuit in *Grillea v. United States*, *supra*, 232 F. 2d 919. There the longshoremen were engaged in replacing the hatch boards after the work in the hold had been completed. As the hatch boards were set in place upon the beams, one of the boards came to rest upon a padeye protruding above the top of the beam, causing the board to be unsteady. As the longshoremen continued to replace the other hatch boards, one of the longshoremen was caused to lose his balance when he stepped upon the unsteady board, as a result of which he fell into the hold suffering injury. The court held the shipowner liable for the unsafe condition on the basis of this court's decisions in *Sieracki*, *Hawn* and *Petterson* cases. The court stated that implicit in those decisions is the principle that it is the shipowner's non-delegable duty throughout the course of the vessel's operations to provide and keep in order a seaworthy vessel and equipment, and it is no defense to the shipowner that the condition may have been created by the longshoremen. Judge Learned Hand, speaking for the court, held further than the shipowner would be liable for the unsafe condition, even if it had been caused by the injured man himself, although under the latter situation the recovery would be reduced *pro tanto* under the comparative negligence rule. The opinion of the Court of Appeals states (p. 922):

"The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'pad-eye' the ship became pro tanto unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doctrine of *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, to longshoremen, while loading or discharging a ship. The respondents answer that a ship's seaworthiness has from time immemorial been measured by her fitness for the service in hull, gear and stowage, that in all these respects the ship at bar was well provided, and that the libellant's injuries were due solely to the negligence of himself or his companion, Di Donna, or both, in selecting the wrong hatch cover to place over the 'padeye'.

. . .

(pp. 922-923)

" . . . In the case at bar although the libellant and his companion, Di Donna, had been those who laid the wrong hatch cover over the 'pad-eye' only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; *it had become part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.* It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the

R

liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect.

"The Court recently reaffirmed this doctrine in *Alaska S. S. Co. v. Petterson*, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, and we have since followed suit in *Poignant v. United States*, 2 Cir., 225 F. 2d 595. *Seas Shipping Co. v. Sieracki*, supra, also held that the contributory negligence of a seaman is not a defense to an action based on the ship's unseaworthiness; although apparently it is a proper factor in fixing the amount of the recovery. *Pope & Talbot v. Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143."

It is apparent that the decision of the court below collides head on with the decisions of this court in the *Sieracki*, *Hawn* and *Petterson* cases, and with the decision of the Court of Appeals for the Second Circuit in the *Grillea* case. The instrumentality which caused the accident in this case was the defective rigging of the boom and tackle for the purpose of unloading the lumber. That it was a defective and dangerous condition was specifically found by both the trial court and the Court of Appeals; that this defective instrumentality was a proximate cause of the accident was likewise found by both courts below. Under these circumstances, it was immaterial that the defective condition was rigged by the longshoremen. The shipowner should have been held liable in any event because of its non-delegable duty.

Chief Judge Biggs, in dissenting, pointed out that the holding of the Court of Appeals is in direct conflict with the *Sieracki*, *Hawn*, *Petterson* and *Grillea* cases, and that the principles enunciated in those cases (infra, p. 37):

"Would require the holding that the ship was liable for the wrongful positioning of the boom and

the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a 'seaworthy' round peg placed in a 'seaworthy' square hole will render the whole unseaworthy." (Emphasis supplied.)

Upon this ground alone, certiorari should be granted, and the decision of the court below reversed.

Second Point: The Court of Appeals Reversed the Findings of the Trial Court Without Applying the Standard That Such Findings Must Be Clearly Erroneous Upon a Review of the Entire Record.

In reviewing a judgment of a trial court sitting in admiralty without a jury, a Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedures. *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6; *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F. 2d 441, 444 (CA 1); *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850, 854 (CA 5); *Union Carbide & Carbon Corp v. United States*, 200 F. 2d 908, 910 (CA 2); *Koehler v. United States*, 187 F. 2d 933, 936 (CA 7).

A review of the decision below upon this ground is sought not because the Court of Appeals chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all of the evidence in the record. Parenthetically, it may be stated that this court stands in review in precisely the same position as did the Court of Appeals. *McAllister v. United States*, *supra*, at U. S. 20-21, L. Ed. 24. If there be competent evidence, unless the court is left with the firm conviction upon a review of the entire

record that a mistake has been made, the findings of the trial court must stand. *McAllister v. United States, supra*, at U. S. page 20, L. Ed. page 24.

In the *McAllister* case, a ship's officer sought recovery from the vessel owner for polio, allegedly contracted as a result of the latter's negligence. The District Court found that the shipowner was negligent, but the Court of Appeals reversed on the ground that this negligence was not shown to have been the proximate cause of the disease. The Supreme Court, after stating the rule regarding the scope and nature of review, concluded that although the Court of Appeals had recognized the proper standard for review, it erred, nevertheless, in the application of that standard. In this connection, this court said (U. S. pp. 20-21, L. Ed. p. 24):

"We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard. In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court are *clearly erroneous*." (Emphasis supplied.)

Upon its own review of the record, this court concluded (U. S. pp. 22-23, L. Ed. p. 25):

"Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. *But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based*

upon such evidence is clearly erroneous." (Emphasis supplied.)

The findings of the district judge were, therefore, reinstated, despite the fact that the Court of Appeals reached a different view. The controlling factor was not whether there was evidence to support the Court of Appeals' view, but whether the District Court's findings were clearly erroneous.

The case at bar seeks a review upon the strict legal ground that the Court of Appeals did not follow the standard prescribed by this court for the review of the trial court's findings in that its decision in this regard is based upon a unique theory which finds no support in the record and which is, in fact, contradicted by the testimony of all witnesses, including the respondents'.

In reversing the trial court's finding that the winch was unseaworthy, the Court of Appeals said that the finding *was* supported by the evidence but that, nevertheless, the application of its own mathematical formula to the "undisputed facts requires the rejection of that opinion and the acceptance of other testimony." The "undisputed facts" upon which the court below relied, and upon which the entire mathematical formula is based, as stated by the court below is (*infra*, p. 33):

"The testimony was clear and undisputed that the hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load uti-

4. The court also indicated that a Coast Guard Regulation 46 C. F. R. Part 111.45-20 (b2) made the setting of the cut-off device at twice the rated load permissive, but this regulation does not refer to ships' winches expressly or impliedly. It has to do with current supplied to lights and water coolers, etc., not involving any strain on gear as is involved in the operation of a ship's winch. Inquiry at the Coast Guard and the Maritime Administration, which designs the plans for the construction of vessels and gear discloses that there is no regulation which governs the cut-off devices on the ship's winches.

lizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage."

It will immediately be apparent that the court labored under a complete misunderstanding regarding the so-called undisputed facts, and, moreover, the mathematical formula which it introduced into the case is not only contrary to all the evidence in the record, but it is most defective from the scientific point of view.

The statement that the hoisting gear is rated to lift a load of not more than one-fifth of the strength of the cable itself is not supported but is contradicted by the evidence. At the outset, it must first be noted that the cable is an integral part of the "hoisting gear" and the cable as well as all the rest of the gear used in the hoisting operation had a rated safe working capacity of *three* tons. How did the Court of Appeals reach the conclusion that it had a fifteen ton capacity with the ability to *adequately* withstand a strain of fifteen tons? This was erroneously inferred from the testimony of witnesses that the gear was designed with a factor of safety five times its safe working capacity. Without alluding further to the testimony, the court *assumed* that the *factor of safety* means *safe working capacity*. This finding which the court below referred to as undisputed fact is absolutely contrary to the testimony of the witnesses, as well as to generally accepted scientific principles. The experts testified that the factor of safety related to the "*breaking point*" of the cable and not its working capacity. The fallacy in the lower court's assumption on this point is demonstrated forcibly by the respondents' own experts. Isaac Stewart, an expert witness who appeared for the respondent vessel, testified as follows (Libellant's Supplemental Appendix 16b):

"The Court: May I interrupt you a moment, Mr. Brass? While we are still on this safe working load,

did I understand you to say that the safe working load of a wire rope is one-fifth of its tensile strength?

The Witness: Breaking load, yes, that is a new rope.

The Court: Now as the deterioration increases in the wire rope the breaking load decreases, does it not?

The Witness: That is right."

Another expert, Walter J. Byrne, testified on behalf of the impleaded respondent in these terms, which likewise destroy the very foundation upon which the extraordinary theory of the lower court rests (N. T. 1900):

"Q. Mr. Byrne, what is the factor of safety on a runner?

A. Five.

Q. Five what?

A. In order to determine the safe working load you divide the breaking strength by five.

Q. In other words, the safety—the safe working load—

A. Is one-fifth.

Q. And if you say it is a hundred per cent over the working load it is a drastic condition. Is that what you are testifying to now?

A. Yes.

(N. T. 1901)

Q. In other words, you say it is drastic even though the safe working load is one-fifth of the breaking load, is that right?

A. That is correct. I am a safety engineer. One pound over the safe working load in my opinion is bad.
(N. T. 1902-03)

The Court: While you are thinking of the form of your question, let me ask this question: As I understand it, this safe working load is what its name implies, namely, a limitation on the recommended load to

which a member of the gear or unit of the gear should be subjected so as to afford a maximum safety tolerance or cushion.

The Witness: Yes, in order to take—also take into account deficiencies, things of that kind, which might occur.

The Court: If you have a given breaking strength of a wire and you have computed the safe working load of that wire as one-fifth of that breaking strength, if by reason of the condition of the wire the breaking strength is reduced, is the safe working load proportionately reduced? Do you understand my question?

The Witness: I do, your Honor, and of course there again it is from the practical aspect. If the breaking strength is substantially reduced due to wear or due to other factors, obviously the safe working load has to be reduced.

I mean it would be inconceivable to think otherwise, that if the wire had deteriorated to the extent that the breaking strain has been weakened, it would be foolhardy to continue the original one-fifth of sound wire breaking strain”

It is thus apparent that the court below not only erred in confusing “factor of safety” with “working capacity”, but also that its novel theory, which is the product of its own reasoning, is fundamentally unsound to the point where it may be so judicially noted. The Court of Appeals went outside the record in evolving that theory. This court may, therefore, take judicial notice of generally recognized scientific principles in examining into it.

In the manufacture of materials which are intended to be subject to stress and strain, the manufacturer must determine the safe capacity of the product, or, to put it otherwise, the amount of strain that it can adequately withstand without suffering any irreversible damage. In arriving at this figure, the manufacturer will test the product by exert-

ing more and more strain until the product finally breaks. Obviously, before this breaking point is reached the substance or body of the product begins to suffer progressively more and more damage as the strain increases; until the entire body of the product completely snaps. A simple experiment with a length of twine or a piece of wood will illustrate the point. If the strain is stopped before the breaking point is reached, the product may, nevertheless, be weakened by a partial break internally or externally, or any number of fibers may be torn; depending upon how close to the breaking point the strain is continued. This would leave the product in a weakened condition and thereby reduce the level of the breaking point. The manufacturer must find the point which is safely below that where the progressive breaking begins. So long as that point is not exceeded the product can be used over and over again without damaging and weakening it. The factor of safety means exactly that. It does not mean that the product has a safe working capacity at a higher level. That would be testing the risk. On the contrary, when the manufacturer specifies on the product, as here, that the gear has a safe working capacity of three tons, it means that it has been tested and that it may be dangerous to apply a greater strain because the progressive damage to the product begins somewhere above that level. The safe capacity of the product ends at the point that the manufacturer specifies. The level of the breaking point under no circumstances represents the safe capacity of the gear as the Court of Appeals reasoned, contrary to the evidence.

The trial judge found that the topping lift cable which was manufactured with a safe work load capacity of three tons was in fact subjected to an excessive strain of between 17 and 21 tons; that this excessive strain was due to two factors: (a) the excessive setting of the cut-off device which failed to stop the winch when the weight of the load exceeded three tons; and (b) the defective condition of the rigging which placed a somewhat greater strain on the topping

lift than on the other gear; that these factors combined to cause the cable to break. That court held the winch to be unseaworthy and a material contributing factor to the accident. Those findings are fully supported by competent evidence, and the record does not sustain any conclusion that they are clearly erroneous.

The Court of Appeals did not hold that the trial court's findings were clearly erroneous, but it simply substituted its judgment for that of the trial judge. In so doing, it violated the standard laid down by this court in the *McAllister* case. The record demonstrates that the findings of the trial judge are not "clearly erroneous" and the Court of Appeals committed error in reversing them.

CONCLUSION.

The issues involved herein are of national importance. Prior cases in the various circuits reveal that the issues herein are frequent occurrences and they affect the everyday work routine of all longshoremen in every port in the country. The decision of the Court of Appeals is a departure from the rulings made by this court, and if allowed to stand will have an injurious effect on the uniform application of the doctrines enunciated by this court.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
SIDNEY A. BRASS,

Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,138

No. 12,139

No. 12,140

JOHN H. CRUMADY, APPELLANT IN No. 12,138

v.

**JOACHIM HENDRIK FISSER, HER ENGINES, TACKLE,
APPAREL, ETC., AND JOACHIM HENDRIK FISSER
AND/OR HENDRIK FISSER,**

Respondents

v.

**NACIREMA OPERATING CO., INC., IMPEADED
RESPONDENT APPELLANT IN No. 12,140
HENDRIK FISSER AKTIEN GESSELLSCHAFT,
CLAIMANT-APPELLANT IN 12,139**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY**

Argued June 13, 1957

Before MARIS, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT

(Filed September 30, 1957)

HASTIE, Circuit Judge.

Proceeding in rem against the ship Joachim Hendrik Fisser, the libellant Crumady has sued in admiralty to hold the ship and its owners responsible for personal injuries suffered by him while working on the ship as a stevedore employed by Nacirema Operating Co. in the unloading of the vessel at a berth in Port Newark, New Jersey. The respondent impleaded libellant's employer, Nacirema Operating Co., seeking thereby to obtain indemnification for any loss it might suffer through this suit.

After full hearing the court held the ship liable, ruling that one factor which contributed to the accident was the unseaworthiness of certain equipment of the ship. The court also allowed the ship to recover over against Nacirema, the party whose negligence, in the court's view, was the "sole, active or primary cause" of the accident.

Each of the parties has appealed. The ship challenges the ruling as to unseaworthiness. Nacirema claims that in any event there was no basis for holding it to indemnify the ship. The libellant complains that the amount of the award was erroneously determined and grossly inadequate.

We consider first the way the issue of unseaworthiness arose and was determined. The libel itself asserted a claim in admiralty for injury caused by the negligence of a ship and its owners, and nothing else.¹ There was no claim that unseaworthiness caused the accident or even that any unseaworthy condition existed. However, discussion at a pre-trial conference seems to have led the court to conclude that libellant's contentions included a claim predicated upon unseaworthiness. In any event, the transcript of the trial judge's statement at the conclusion of the pre-trial

1. Since *Pope & Talbot, Inc. v. Hawk*, 1953, 236 U. S. 406, it has been authoritatively established, if not unanimously agreed, that admiralty affords an injured workman so situated as libellant two distinct causes against the ship, one for negligent injury, and the other for injury caused by the unseaworthiness of the vessel, although, of course, there can be only one recovery of damages for the same personal injuries.

conference shows that he undertook to frame the issues, saying, apparently with the acquiescence of the parties, that the libellant "contends in effect that the injuries complained of resulted from the unseaworthiness of the vessel. . . ." In addition, the court made it clear that the structure alleged to have been unseaworthy was a cable or topping-lift which parted causing a boom which it supported to fall upon the libellant. Thereafter, libellant's proof was directed at establishing that the topping-lift was worn and defective and, for that reason, parted under the strain of lifting cargo which sound gear would have withstood.

The evidence relevant to this theory of liability was conflicting and the court, with adequate basis in the record, found as a fact that the topping-lift was not defective but "was adequate and proper for the loads for which the rest of the gear was designed and intended". The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed. In addition, though forbidden to change the position of the head of the boom which the crew of the vessel had placed over the center of the hatch, they had changed the attachment of the preventer and guy which controlled the position of the boom so that the head of the boom was no longer over any part of the hatch but had been moved a distance to port of the hatch opening. The excessive and abnormal strain which this incorrect procedure imposed upon the topping-lift will be discussed later. It suffices to point out now that the court with justification attributed the accident primarily to this negligence of Nacirema.

But having thus eliminated the basis of unseaworthiness formulated at pre-trial, the court found and adopted a new theory of the ship's unseaworthiness and responsi-

bility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. An understanding of the court's reasoning requires the consideration of additional circumstances not heretofore mentioned.

The gear being used at the time of the accident was rated and approved to lift a load of three tons or less. In the actual unloading operation a cable, called a cargo runner, was attached to the object to be lifted from the hold. This runner extended upward over a block at the end of a boom high above the hold and thence to and around a winch powered by an electric motor. The electrical equipment in this case included an automatic circuit breaker which stopped the flow of power to the winch whenever the current built up beyond the amperage for which the device had been set. Witnesses were asked to relate the cut off amperage to the strain imposed upon the winch by the load it was lifting. The witnesses agreed that the cut off was set so that if the motor should be required to overcome a strain on the cargo runner somewhat in excess of six tons the current would quickly build up to the setting of the circuit breaker and the motor would automatically cut off. In this case, the motor did cut off, apparently just before the topping-lift parted.

The libellant seems to have introduced testimony about the cut off device in an effort to show that the power was cut off before the gear was subjected to any greater strain than it should have been able to withstand. But in analyzing this testimony, much of which was a rather confused discussion of "load" and "torque" and other electrical concepts induced by questions addressed to the witnesses as though the concepts were mechanical rather than electrical, the court concluded that it was unsafe practice, rendering the gear unseaworthy, to have the cut off set so that the circuit would not be broken until the tension in the cargo runner should exceed six tons. In other words, the court thought the rating of the gear to handle a cargo

load of three tons indicated that it was unsafe to have the circuit breaker so set that the cargo runner might be subjected to a six ton strain.

While the court's reasoning was in accord with an opinion expressed by a witness, the application of mathematics to the undisputed facts requires the rejection of that opinion and the acceptance of other testimony, based in part upon a Coast Guard standard for the setting of such a control, indicating that the setting of the cut off device was entirely safe and proper. The testimony was clear and undisputed that hoisting gear of the kind in suit is rated to lift a load not more than one fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage. Indeed, as the testimony shows and the laws of physics teach, inertia, friction and the normal circumstances of operation make it necessary that substantially more than a three ton strain be imposed upon the gear before a three ton load can be lifted. Thus, the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

This was demonstrated by what happened in the present case. A strain of six tons or more on the cargo runner had no effect on that cable. The circuit breaker cut off the power at that point, while the strain was still well within the capacity of the cable. By the same token, if this operation had been conducted normally and properly the strain on the topping-lift would have been well within its capacity when the circuit breaker intervened. For this part of the gear also was rated to handle three tons of cargo and thus could withstand a fifteen ton strain.

The decisive fact, as the court found, it, was that the employees of Nacirema had so changed the position of the head of the boom as to seriously distort the normal com-

position of forces which is presented by a straight lifting operation. It was for this reason that the topping-lift was subjected to an enormous, abnormal and unanticipated strain. On the basis of expert testimony the court found as a fact that this strain was somewhere between seventeen and twenty-one tons, three or four times the strain then being imposed on the cargo runner and the winch.

This analysis leads to two conclusions. It was a proper finding that the negligence of the stevedores was "the sole active or primary cause" of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema "brought into play the unseaworthy condition of the vessel". The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.² Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventual-ity was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred.

A decree should have been and now must be entered denying the libellant recovery. In these circumstances we do not reach the substantial question raised by the impleaded respondent whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained.

The judgment will be reversed.

2. *The Silvia*, 1898, 171 U. S. 462; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d 834; see *Berti v. Compagnie de Navigation Cyprien Fabre*, 2d Cir. 1954, 213 F. 2d 397, 400. Cf. *The Daisy*, 9th Cir. 1922, 282 Fed. 261.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

September 30, 1957

IDA O. CRESKOFF,
Clerk.

**OPINION OF THE COURT
ON PETITION FOR REHEARING.**

(Filed December 5, 1957.)

Before BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE,
Circuit Judges.

PER CURIAM:

A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied.

BIGGS, Chief Judge, dissenting.

My brother Hastie's succinct opinion expressing the majority view as to why the accident to Crumady occurred raises an issue which requires rehearing before the court *en banc*. The majority opinion correctly concludes that Crumady was injured because a seaworthy boom, topping lift and tackle were employed to lift cargo from the vessel's hold but because the boom and topping lift were wrongly positioned by the stevedoring crew too great a strain was put on the boom and topping lift causing the topping lift to break.

Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), *aff'd per curiam* 347 U.S. 396 (1954), held that the responsibility of the ship owner was not shifted to the stevedoring crew because that crew brought on board and made use of a defective block which caused Petterson's injuries. The Court of Appeals for the Second Circuit in Grillea v. United States, 232 F. 2d 919 (1956), held that where longshoremen placed a seaworthy, but wrong, hatch-cover over a "pad-eye", and thereafter a longshoreman stepped on the hatch-cover which gave way under him, causing him serious injuries, the ship was liable. In the case at bar, it would ap-

pear that a logical and necessary extension of the principles enunciated in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and in *Petterson*, would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a "seaworthy" round peg placed in a "seaworthy" square hole will render the whole unseaworthy. While it does not appear how long a time elapsed between the positioning of the boom and the topping lift and the occurrence of the accident in the case at bar, it is clear that some time necessarily elapsed.

For these reasons I conclude that rehearing should be had before the court *en banc*.

ORDER SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated: December 5, 1957

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.

FILED

S. JUN 3 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. ~~999~~ 61

JOHN H. CRUMADY,

Petitioner,

JOACHIM HENDRIK FISHER, Har Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISHER, and/or HENDRIK FISHER,

Respondents,

v.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**PETITIONER'S REPLY TO RESPONDENTS' BRIEFS
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

ABRAHAM E. FREEDMAN,

SIDNEY A. BRASS,

1415 Walnut Street,

Philadelphia 2, Pa.

Counsel for Petitioner.

IN THE
Supreme Court of the United States.

October Term, 1958. No.

JOHN H. CRUMADY,

Petitioner,

v.

JOACHIM HENDRIK FISSER, HER ENGINES, TACKLE,
APPAREL, ETC., AND JOACHIM HENDRIK FISSER,
AND/OR HENDRIK FISSER,

Respondents,

v.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**PETITIONER'S REPLY TO RESPONDENTS' BRIEFS
IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI.**

In urging that the petition for a writ of certiorari be denied, both respondents, the vessel and impleaded stevedore, Nacirema, contend that one of the two issues raised in the petition was never advanced or passed upon below and that, therefore, this court should not exercise its powers of review. Beside the fact that substantial justice would require a review, even if respondents' statement were correct, the fact is that the specific issue was raised and considered below. The great stress which the respondents place upon this diversionary point, and their complete neglect of the real issues in the case, support the contention that there is real need for a review of the issues raised in the petition.

When this case was tried in the district court, petitioner contended that the vessel was liable upon two grounds: (a) that the topping lift cable was defective; and (b) that the winch was unseaworthy because its cut-off device was improperly set. The trial judge found that the cable was sound, but that the vessel was unseaworthy because the circuit breaker in the winch had been set at an excessively high level. Since this fact contributed to the accident, he held the ship liable to the injured longshoreman.

The court then proceeded to determine the liability as between the vessel and Nacirema, the third party defendant. In this connection the trial court found that the ship's boom and tackle, which were employed to unload the lumber, had first been rigged by the ship's crew, but thereafter, in order to carry on the unloading operation, Nacirema had reset the position of the boom and supporting cables in such a manner as to place a greater strain upon the topping lift than upon the other gear, when this hoisting apparatus was put into operation. The trial judge held that this was an unsafe and dangerous condition which "brought into play" the unseaworthy condition of the winch to cause the accident. Upon this ground, the court held Nacirema liable over to the ship. Nacirema appealed from this decree and the vessel filed a protective appeal from the decree against it in favor of petitioner.

In the Court of Appeals, petitioner, as appellee, in support of the trial court's findings, was not required to argue anything other than the unseaworthy condition of the winch, as found by the district court. However, the Court of Appeals reversed the district court's finding that the winch was unseaworthy and held that the accident resulted solely from the improper setting of the boom and tackle. The Court of Appeals then assumed, without benefit of argument, that the ship could not be responsible for this condition because it had been rigged by Nacirema, and,

therefore, reversed the judgment which had been entered in favor of petitioner.

It was from this background that the issue of the vessel's responsibility for an unsafe condition caused by the stevedore came into the case. It was injected into the case by the decision of the Court of Appeals and not by any "switching of theories" as the respondents so repeatedly charge.

Confronted with the new issue raised by the decision of the Court of Appeals, petitioner filed a petition for rehearing, pointing out that under the various decisions of this court the shipowner may not divest himself of responsibility for injuries to longshoremen due to unsafe conditions caused by the stevedores. The Court of Appeals denied the petition for rehearing upon the ground that there was no merit in petitioner's contentions.

It is thus apparent that respondents' complaints that the issue here involved "was never advanced or passed upon below" are clearly unfounded and should be regarded as diversionary from the true issues presented by this petition.

On the merits, respondents slough off the issues raised by the petition and avoid direct challenge through the use of inaccurate generalities.

Respondents contend that there is no conflict between the decision in the instant case with those cited by petitioner, but they carefully refrain from meeting the specific facts or principles of those decisions. In referring to this court's decision in *Alaska S. S. Co. v. Peterson*, 347 U. S. 397, affirming 205 F. 2d 478, the respondent vessel states that the principles of that case only applies to those cases where equipment breaks because it is defective, whereas the expressed basis for the decision rests upon the warranty of seaworthiness and embraces every condition which renders the place of work unsafe. In commenting on the case of *Seas Shipping Company v. Sieracki*, 328 U. S. 85,

respondent vessel avoids the main principle and would distinguish the case on the ground that "this Court made specific reference to the fact that the weight being lifted when the accident occurred was well within the working capacity of the gear involved." That statement is, indeed, significant. Although it begs the real question in the *Sieracki* case, it does, however, support petitioner's contention in this case that the gear should not be subjected to a strain in excess of its rated working capacity. The working capacity in the *Sieracki* case was limited to the safe working load, as petitioner here contends, and not five times that amount, as the Court of Appeals erroneously assumed.

Respondent ship's comment on *Rogers v. U. S. Lines*, 347 U. S. 984, is likewise based upon an erroneous concept of that case. Respondents refer to that case only with the brief comment that it is distinguishable because the cable used in that case was defective. The opinions show exactly the contrary. There the cable was furnished by the longshoremen and it proved to be too short to reach into the sides of the ship's lower hold, and as a result the cable started to rewind after it had run out its full length and swung back injuring one of the longshoremen. There was no structural defect, as respondent states, but the cable as rigged was too short. Respondents carefully avoid the principle of that case which holds the shipowner liable for an unsafe condition, whether it be due to a structural defect, an unsafe setting or other unsafe condition.

Respondents' comment regarding the conflict with the decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, likewise mistakenly construes the facts and the principle of law involved. Respondents pass over the *Grillea* case quickly with the attempted distinction that the case there involved "an accident resulting from an unseaworthy condition in the ship's structure and does not involve an accident occurring

because of a ship's misuse of equipment." In the *Grillea* case the opinion clearly shows that there was no structural defect as respondents state. On the contrary, one of the longshoremen improperly placed a hatch board in a wrong position so that it tilted when another longshoreman walked over it, causing injury. The court there held that when the hatch board was set in position it became a part of a pathway, and, since it was unstable, it rendered the vessel unseaworthy. The analogy between that case and the one at bar is most striking, and it is obvious that respondents' analysis both with respect to the facts as well as the law of that case is incorrect.

Nacirema attempts to distinguish the *Grillea* case on the ground that "a proper hatch cover which was placed over the padeye became an integral part of the vessel and rendered it unseaworthy." That comment applies with equal force to the instant case. The boom and tackle were set in a dangerous position here, as the hatch cover was in *Grillea*, and the boom and tackle as so set were no less an integral part of the vessel than the hatch cover. On this very point, Chief Judge Biggs, dissenting in the instant case, said: "This is a doctrine to the effect that a 'seaworthy' round peg in a 'seaworthy' square hole will render the whole unseaworthy."

The respondents' superficial analysis and comment of the pertinent decisions serve only to emphasize the conflict between those decisions with that of the court below. The second issue raised by the petitioner is also treated in a very perfunctory fashion. Petitioner has demonstrated that the Court of Appeals below, in reversing the trial court, failed to show that the findings of the trial judge were clearly erroneous, but reversed on the basis of a mathematical formula which finds no support and is contrary to the record. Respondents' failure to support the lower court's "mathematical formula" by any evidence in the record or by any scientific theory demonstrates that

Petitioner's Reply

the trial court's finding of unseaworthiness, admittedly based on competent evidence in the record, is not "clearly erroneous" and the trial court's finding in this respect should not have been reversed.

The diversionary arguments of the respondents emphasize not only the importance of the principles involved, but the merit of petitioner's contentions.

It is respectfully submitted that this court should exercise its power of review to the end that the decision of the Court of Appeals below be reversed.

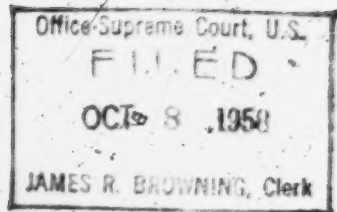
Respectfully submitted,

ABRAHAM E. FREEDMAN,

SIDNEY A. BRASS,

Counsel for Petitioner.

LIBRARY
SUPREME COURT, U. S.



IN THE
Supreme Court of the United States

October Term, 1958.

No. 61.

JOHN H. CRUMADY,

Petitioner.

**"JOACHIM HENDRIK FISSER", her engines, tackle, apparel,
etc., and JOACHIM HENDRIK FISSER, and or HEN-
DRIK FISSER.**

**On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit.**

Brief for the Petitioner.

ABRAHAM E. FREEDMAN,

SIDNEY A. BRASS,

1415 Walnut Street,

Philadelphia 2, Pa.

Counsel for Petitioner.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. The Decision of the Court Below Violates the Basic Maritime Principle That a Shipowner May Not Cir- cumvent His Absolute and Non-delegable Duty With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Stevedoring Contractor the Responsibility of Providing Rigging and Main- taining a Ship's Gear	7
II. The Court of Appeals Reversed the Findings of Fact of the Trial Court Without Applying the Standard That Such Findings Must Be Clearly Erroneous Upon a Review of the Entire Record	22
CONCLUSION	29

TABLE OF CASES CITED.

	Page
Aguilar v. Standard Oil Co., 318 U. S. 724	8
Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208	8, 9
Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441 (CA 1)	22
Brabazon v. Belships Co., 202 F. 2d 904 (CA 3)	14
C. J. Dick Towing Co. v. The Leo, 202 F. 2d 850 (CA 5)	22
The Dredge No. 15, 264 F. 135	11
Glover v. Compagnie Generale Transatlantique, 103 F. 2d 557 (C. A. 5)	10
Grillea v. U. S., 232 F. 2d 919	5, 12, 19, 21
Grillo v. Royal Norwegian Government, 139 F. 2d 237 (C. A. 2)	12, 18
International Stevedoring Co. v. Haverty, 272 U. S. 50, 71 L. Ed. 157	8
Koehler v. United States, 187 F. 2d 933 (CA 7)	22
Larsen v. United States, 72 F. Supp. 137	18
Lauro v. United States, 162 F. 2d 32	18
Lynch v. United States, 163 F. 2d 25, cert. den. 326 U. S. 743	18
Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 661	10, 11, 18
McAllister v. United States, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6	22, 23, 29
The Nako Maru, 1938 A. M. C. 770 (E. D. Pa.), reversed on other grounds at 101 F. 2d 716, cert. den. 307 U. S. 641	10
The No. 34, 25 F. 2d 602 (C. A. 2)	10
The Omsk, 266 F. 200 (C. A. 4)	10
The Osceola, 189 U. S. 158, 47 L. Ed. 764	10, 11, 18
Pacific American Fisheries v. Hoof, 291 F. 306, cert. den. 263 U. S. 712	11

TABLE OF CASES CITED (Continued).

	Page
Petterson v. Alaska S. S. Co., 205 F. 2d 478, affirmed per cur. 347 U. S. 396	5, 12, 15, 17, 19, 21
Pope & Talbot v. Hawk, 346 U. S. 406	13, 17
Rich v. United States, 177 F. 2d 688 (C. A. 2)	12
Read v. United States, 201 F. 2d 758 (CA 3)	14
Rogers v. U. S. Lines, 205 F. 2d 57	14, 15, 17, 19
The H. A. Scandrett, 87 F. 2d 708	9
Seas Shipping Company v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099	5, 7, 8, 10, 11, 13, 17, 18, 19, 21
Shields v. United States, 175 F. 2d 743	12
The Spokane, 294 F. 242 (C. A. 2), cert. den. 264 U. S. 583	10
Standard Oil Co. v. Robins Drydock & Repair Co., 25 F. 2d 339	18
Sutherland v. Buckeye Cotton Oil Co., 259 F. 909	11
The Joseph B. Thomas, 86 F. 658 (C. A.)	10
Union Carbide & Carbon Corp. v. United States, 200 F. 2d 908, (CA 2)	22
Uravic v. Jarka Co., 282 U. S. 234, 75 L. Ed. 312	8

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Coast Guard Regulation, 26 C. F. R. Part 111.45-20 (b2)	24
Federal Rules of Civil Procedure, Rule 52(a)	22

IN THE
Supreme Court of the United States.

October Term, 1958.

No. 61.

JOHN H. CRUMADY,

Petitioner.

v.

"JOACHIM HENDRIK FISSER", HER ENGINES, TACKLE,
APPAREL, ETC., AND JOACHIM HENDRIK FISSER,
AND/OR HENDRIK FISSER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court for the District of New Jersey is reported at 142 F. Supp. 389 (R. 14). The opinion of the Court of Appeals for the Third Circuit is recorded in 249 F. 2d 818 (R. 109). The opinion of the Court of Appeals on petition for rehearing is reported in 249 F. 2d 821 (R. 129).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 30, 1957 (R. 115). The order denying rehearing was entered on December 5, 1957 (R. 131). On February 21, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to April 2, 1958. On February 27, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to May 2, 1958. The petition was filed on April 25, 1958, and it was granted on June 9, 1958. The jurisdiction of this court rests upon 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a shipowner engages a stevedore contractor to unload the ship's cargo, and said stevedore, in order to conduct the unloading operation, rigs the ship's gear in an improper, unseaworthy manner, as a result of which a cable breaks while the cargo is being unloaded, causing the boom to collapse and injure one of the longshoremen, can the shipowner escape liability because the dangerous instrumentality which caused the accident was rigged by the stevedore?

2. Where the findings of the trial judge are based on competent and substantial evidence, may the Court of Appeals reverse such findings by substituting its own judgment for that of the trial judge without a holding or showing that the findings are clearly erroneous?

STATEMENT OF THE CASE.

Petitioner, a longshoreman, was seriously injured by a falling boom while engaged in an unloading operation aboard respondent vessel, the "Joachim Hendrik Fisser". He brought this action against the vessel, claiming that his injuries resulted from defective equipment and the negligence of the respondents. The vessel thereupon impleaded Nacirema Operating Company, the stevedoring contractor, petitioner's employer, as third party respondent.

The undisputed facts, as found by the court below, disclose that the respondent vessel arrived in Port Newark, New Jersey, on January 2, 1954, with a cargo of lumber. Nacirema Operating Company was engaged to furnish the longshoremen required for discharging the lumber. Before the unloading operation began, the ship's crew had set the boom and rigging directly over the center of the hatches, but thereafter, before the operation during which petitioner was injured began, the stevedores reset the boom and tackle in such a position that a greater strain was imposed upon the cable that secured the boom to the mast (topping lift) than was imposed upon the other cables, during the hoisting operation. All of the gear, including the boom and cables and the electric winch which supplied the power, had a rated safe work load capacity of three tons. The winch was equipped with a cut-off device, sometimes referred to as a governor, which in this situation had been set to shut off the power from the winch when the load being lifted was more than *six tons*. The trial judge found that this setting of the cut-off device in excess of six tons, rendered the vessel unseaworthy because it subjected the gear to more than twice its safe working capacity.

The stevedores were in the course of hoisting two timbers from the hold when one end of a timber became wedged and caught under the hatch coaming. As the power in the winch increased the strain on the cables pulling the load, the cut-off device failed to shut off the power within the safe working limits of the gear, with the result that

the excessive strain caused the topping lift to break and the boom to fall upon petitioner.

The trial judge found that the topping lift broke while it was under an excessive strain of 17 to 21 tons; that the rigging as reset by the stevedores was unsafe because it placed a greater strain on the topping lift than upon the other cables because of the angle at which it was reset; and that this fact "brought into play" the unseaworthy condition of the winch, resulting in the accident (R. 33).

Upon these findings, the trial court, accordingly, held the vessel liable to petitioner because of the unseaworthy winch and held the impleaded respondent liable over to the vessel because of the unseaworthy condition of the boom and tackle as reset by the stevedores.

Nacirema first appealed from the judgment against it and the vessel thereupon cross-appealed from the judgment in favor of petitioner. The judgment in favor of petitioner was reversed by the Court of Appeals below upon the ground that although the cut-off device on the winch was set to shut off the power when the load was more than twice the safe rated capacity of the gear, this did not render the winch unseaworthy because the gear was assumed to have a factor of safety of five times its rated safe working capacity. Reasoning from this, the court below in conflict with all of the evidence, stated that the gear actually had a working capacity of 15 tons and not merely three tons, which was the manufacturer's official rating as the maximum safe working capacity.

1. There is no evidence in the entire record to support this unique holding of the court below, inferentially or otherwise. All of the experts, including respondents', testified that the factor of safety refers to the *breaking* point of the gear and not its working capacity. Obviously, if the gear should be strained beyond its safe working load, as it approaches the breaking point irreversible changes take place. Such deterioration reduces the factor of safety and lowers the breaking point. The court below confused breaking point with safe working capacity, and thus fell into serious error.

Following this unsupported and clearly erroneous premise, the court below concluded that a strain of six tons, which was twice the safe working capacity of the gear, "did not in itself create any undue risk of breakage." (R. 112). The Court of Appeals, therefore, reversed the finding that the cut-off device in the winch was improperly set and held that the sole cause of the accident was the dangerous condition of the rigging as reset by the stevedores. The court, therefore, exonerated the vessel completely. In view of that finding, the liability as between the respondent and impleaded respondent became moot.

Since the trial court had placed the liability of the vessel to the petitioner because of the unseaworthiness of the winch, petitioner did not find it necessary to rely on any other theory upon the appeal below. However, after the Court of Appeals rendered its decision reversing the findings of fact of the trial judge, petitioner moved for a rehearing upon the ground not only that the reversal of the fact findings of the trial judge was erroneous, but also that the ship must be held responsible for the dangerous condition of the rigging, regardless of whether it was set by the vessel's crew or by Nacirema, because of the non-delegable nature of the vessel's duty to the longshoremen. The majority of the court below dismissed this contention as being without merit and did not comment further. Chief Judge Biggs, however, dissented for the reason that the shipowner should have been held liable for the defective condition of the rigging, even though it had been set by the longshoremen under rulings of this court in *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478, affirmed per cur. 347 U. S. 396; *Sea's Shipping Company v. Sieracki*, 328 U. S. 85; and the holding of the Court of Appeals for the Second Circuit in *Grilled v. U. S.*, 232 F. 2d 919.

SUMMARY OF THE ARGUMENT.

(a) It is the shipowner's absolute and non-delegable duty to provide the longshoremen engaged in the ship's service with a safe and seaworthy vessel and equipment. This includes not merely the duty to furnish in the first instance safe and seaworthy equipment, but also to maintain it in a safe and seaworthy condition throughout the operations in which the longshoremen are engaged. The shipowner may not nullify or circumvent this duty by parceling out its operations to intermediary employers. Since it is established by the holdings of both lower courts that the boom and rigging were set so as to constitute an unsafe instrumentality, the use of which caused the accident, then it makes no difference that it had been so set by the stevedoring crew rather than the ship's crew. The shipowner was responsible in either event because of its non-delegable duty.

(b) The trial judge found upon competent evidence in the record that the winch was unseaworthy because its cut-off device was set at an excessively high level, which did not shut off the power until after the cable had been subjected to a load more than twice its safe working capacity. The Court of Appeals reversed this fact finding of the trial judge upon an erroneous premise, contrary to the evidence in the record, by confusing the breaking point of the cable with its safe working capacity. From this it reasoned fallaciously that the excessive setting of the winch was not improper, despite the fact that it imposed a strain upon the cable of more than twice its safe working capacity. The Court of Appeals thus erred in reversing a fact finding of the trial court without showing that the trial court's finding was clearly erroneous.

ARGUMENT.**I.**

The Decision of the Court Below Violates the Basic Maritime Principle that a Shipowner May Not Circumvent His Absolute and Non-delegable Duty with Respect to the Vessel and its Equipment by Attempting to Delegate to a Stevedoring Contractor the Responsibility of Providing Rigging and Maintaining a Ship's Gear.

Petitioner's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and non-delegable* obligation to provide the longshoremen engaged in the ship's services with a safe and seaworthy vessel and equipment, and that, consequently, *the shipowner is not free to nullify his duty by parcelling out his operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port, or by other devices which would strip the men performing its service of their historic protection.* *Seas Shipping Company v. Sieracki*, 328 U. S. 85. Translated into the context of the case at bar, this means that irrespective of the convenience or desires of the shipowner, the maritime law fastens upon him the responsibility for any defect, insufficiency or other unsafe condition of the unloading gear necessary to carry out the ship's enterprise, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. *Whatever concurrent duty the law may impose upon these intermediary employers, and whatever concurrent fault may be attributable to them, the shipowner's responsibility remains constant and unaffected.* This proposition is spelled out in so many words by this court in its landmark decision in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, which was the culmination of a long and troubled history in the field of litigation involving the rights of long-

shoremen against vessels by whom they were not employed, but for whom they were performing work essential to the vessel's enterprise, work which was formerly done, in the main, by seamen who were members of the crew. Without reviewing it in detail here, suffice it to say that its history is punctuated by numerous attempts on the part of the ship-owners to nullify and restrict the scope of their liability, and to shift to others their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions, "refinements" which, as this court aptly characterized in a related connection, "cut the heart from a protection to which they are wholly foreign in aim and effect." *Aguilar v. Standard Oil Co.*, 318 U. S. 724, at 736. These attempts have regularly failed before this court, and before those federal appellate courts which rightly gauged the trend and policy of the decisions preceding *Sieracki*, particularly the decisions in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208; *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157; and *Uravic v. Jarka Co.*, 282 U. S. 234, 75 L. Ed. 312. As this court pointed out in *Sieracki*, (foot-note 16, U. S. p. 98, L. Ed. p. 1108):

"It is in relation to liability for personal injury or death arising in the course of his employment on the ship that the policy of our law has been most favorable to the stevedore's claims."

This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relationship brought about by modern specialization in the maritime industry, the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, is subject to the same risks and hazards as are the members of the crew; and he is, therefore, entitled to the same protections so far as these are consistent with his relation to the vessel. This policy is

predicated upon the further explicit recognition that any toleration of division of responsibility as between the ship and those intermediary employers who undertake to perform portions of the ship's work will result, in the first instance, in a progressive evasion of responsibility, and ultimately may leave the injured longshoreman without relief altogether.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrovek, supra*, 234 U. S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally applicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these phases of the vessel's enterprise. In so doing the shipowner did not relieve himself of his traditional obligations. For these men, though not members of the crew, were doing precisely the work of the crew, as necessary to the accomplishment of the ship's enterprise as navigation itself. Rightly, these men looked to the vessel for the safe accomplishment of their work; safe in a comparative sense, only for, as graphically expressed in *The H. A. Scandrett*, 87 F. 2d 708, 711: "A ship is an instrumentality full of internal hazards aggra-

vated, if not created, by the uses to which she is put." No one is in a better position than the vessel to take such proper and adequate means to reduce the hazard as the nature of the instrumentality, and the enterprise in which she is engaged, will reasonably allow. As this court said in *Sieracki, supra* (U. S. p. 94, L. Ed. pp. 1104-06): "Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its costs." Thus it is that it has been the shipowner's traditional responsibility to provide those engaged in the ship's service, whether members of the crew or not, with a safe and seaworthy vessel—a duty which embraces within its scope a safe place for the performance of the work,² as well as to supply and keep in order proper equipment for its execution.³

Nor has the present stage of maritime practice of hiring so-called independent contractors, who, in turn, are technically the employers of the men who now perform certain phases of the ship's work, altered the legal incidents of the underlying relationship in the slightest degree. The shipowner's traditional obligation remains, and he cannot insulate his liability for its breach by the device of an intermediate employer, for the obligation is non-delegable. The device is of benefit primarily to the shipowner, who derives the advantages of specialized skill without increasing his maritime obligations. There are no reasons of policy to dilute these obligations nor any considerations of

2. *The Joseph B. Thomas*, 86 F. 658, 660 (C. A. 9); *The No. 34*, 25 F. 2d 602, 604 (C. A. 2); *The Spokane*, 294 F. 242, 255 (C. A. 2), cert. den. 264 U. S. 583; *The Omsk*, 266 F. 200, 202 (C. A. 4).

3. *Glover v. Compagnie Generale Transatlantique*, 103 F. 2d 557 (C. A. 5); *The Nako Maru*, 1938 A. M. C. 770 (E. D. Pa.), reversed on other grounds at 101 F. 2d 716, cert. den. 307 U. S. 641; *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 88 L. Ed. 661; *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764.

equity which could possibly serve as a basis for permitting the shipowner to thus slough off his responsibilities.

That the shipowner finds it commercially expedient to farm out various longshore operations involved in a vessel's enterprise is understandable. To permit him, on this account, to escape his traditional responsibilities to the men who perform the ship's work would be indefensible:

" . . . he is at liberty to conduct his business by securing the advantage of specialization in labor and skill brought about by modern divisions of labor. *He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do.*" (Emphasis supplied) *Seas Shipping Co. v. Sieracki*, *supra*, 328 U. S. 85, 100, 90 L. Ed. 1099, 1109.

The shipowner's obligation to supply a seaworthy vessel and safe and seaworthy appliances is absolute and non-delegable. *Seas Shipping Co. v. Sieracki*, *supra*, 328 U. S. 85, 90 L. Ed. 1099; *Mahnich v. Southern S. S. Co.*, *supra*, 321 U. S. 96, 88 L. Ed. 661; *Sutherland v. Buckeye Cotton Oil Co.*, 259 F. 909. It is likewise continuing in character. As this court pointed out in the *Mahnich* case, *supra*, at U. S. p. 104, L. Ed. p. 567, quoting from *The Osceola*, 189 U. S. 158, 175, 47 L. Ed. 764, the owner's obligation is to "supply and keep in order the proper appliances appurtenant to the ship." (Emphasis in the original.) See also *Pacific American Fisheries v. Hoof*, 291 F. 306, cert. den. 263 U. S. 712; *The Dredge No. 15*, 264 F. 135.

In the case at bar, the court below did not set forth its reasons for rejecting petitioner's contention that the ship-

owner's duty to provide and maintain the vessel in a safe and proper manner extends throughout the stevedore's operations because of its non-delegable nature. However, it is implicit in the finding of the Court of Appeals below that the shipowner's duty to maintain the gear in a proper manner ends when the longshoremen come aboard, and this theory arises out of the so-called "control" doctrine, which was thoroughly repudiated by this court in *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396.

To allow the "control" theory would require a holding that although the obligation is non-delegable, it may nevertheless be delegated to intermediary employers; and that although the obligation of the owner is to *supply* as well as to *keep in order* the appliances appurtenant to the ship, this obligation ceases at the very moment when it becomes most necessary, that is to say, at the very moment when the ship and its appliances must be used for the purposes for which they are intended. Under the "control" theory, the shipowner is thought to be relieved from the obligation solely and precisely for the asserted reason that during the time the intermediary employers are working aboard the ship he is deprived of control over the vessel and its appliances: that the intermediary employer's "control" during these operations is such that it completely divests the owner of the ability to meet his obligations. Yet, had a member of the crew been injured under the circumstances here disclosed, instead of the petitioner, the shipowner's liability would have been clear for, "*The shipowner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo. . . .*" *Shields v. United States*, 175 F. 2d 743. This doctrine has been, in fact, equally applied to longshore workers: *Grillo v. Royal Norwegian Government*, 139 F. 2d 237 (C. A. 2); *Rich v. United States*, 177 F. 2d 688, 691 (C. A. 2); *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396; *Grillea v. United States*, 232 F. 2d 919. The truth of the matter is that both in fact as well as in

contemplation of law, dominant control over the ship and its activities remains in the shipowner precisely because as to all matters relating to the ship's enterprise the right as well as the duty of ultimate management and control are firmly and irrevocably lodged in the shipowner. While a measure of control over the unloading gear was undoubtedly possessed by Nacirema in the sense that its employees were handling it at the time of the accident, this is not the type of control that can legally divest the shipowner of his paramount and ultimate right of exclusive control, nor of the non-delegable obligations incident thereto. The test is not whether, in the particular instance, control is actually exercised by the ship, but whether the right of control exists.

This principle, as outlined in the *Sieracki* case, was again attacked in *Pope & Talbot v. Hawn*, 346 U. S. 406, upon the ground that the longshoremen were not entitled to the same status as the seamen, who are members of the crew. This court in the *Hawn* case unequivocally rejected this further attempt to create a distinction between the members of the crew and the longshoremen, stating (U. S. p. 412, L. Ed. p. 152):

"We are asked to reverse this judgment by overruling our holding in *Seas Shipping Co. v. Sieracki* (U. S.) *supra*. *Sieracki*, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. *That identical argument is repeated here. We reject it again and adhere to Sieracki.*" (Emphasis supplied.)

Following the *Sieracki* and *Hawn* decisions, a number of conflicting decisions were rendered by the Courts of Ap-

peals for the Second and Third Circuits. In *Read v. United States*, 201 F. 2d 758 (CA 3), the vessel was held liable to a longshoreman under the shipowner's non-delegable duty, despite the fact that under a contractual arrangement the duty to supply lighting facilities had been "delegated" to the longshoreman's employer. In *Brabazon v. Belships Co.*, 202 F. 2d 904 (CA 3), a longshoreman was injured in the hold of the vessel when a board upon which he was walking collapsed. The board was not supplied by the ship and its origin was undetermined. The court rejected the shipowner's principal contention (202 F. 2d at 906) "that the hold having been safe when loading operations began, the shipowner thereafter has no affirmative responsibility whatever for shipboard hazards not of his own creation that may come into existence in the independent contractor's work area during the course of loading," and imposed responsibility on the vessel. The Court held that even as to liability for negligence the stated circumstances do not operate as a general rule of absolution from responsibility. The same Court of Appeals, however, reached a different conclusion in *Rogers v. U. S. Lines*, 205 F. 2d 57, a case very similar to the one at bar. There, the stevedores were engaged in unloading ore from the holds of the vessel onto railroad cars on the pier alongside. The booms and other tackle were so set by the stevedores that the cable from the winch, which had been furnished by the stevedore, was not long enough to extend all the way into the wings of the ship. As the ore tub was lowered down and swung in toward the wings, the cable ran out its full length and then started to rewind as the drum of the winch kept revolving. This caused the tub to swing back across the hold, striking and seriously injuring one of the longshoremen. The Court of Appeals for the Third Circuit held that the ship could not be liable because the cable which was not long enough had been furnished and rigged by the stevedore. The opinion of the

Court of Appeals, which was reversed by this court without opinion at 347 U. S. 984, discloses unsound reasoning, as follows (pp. 57-58):

"Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with the other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed."

This court reversed that decision per curiam without opinion on the same day that it affirmed the decision of the Court of Appeals for the Ninth Circuit in *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396. The Court of Appeals has again committed exactly the same error in the case at bar as it did in the *Rogers* case.

This court's decision in *Petterson v. Alaska S. S. Co.*, *supra*, 347 U. S. 396, is likewise in square conflict with that of the court below. There the stevedores brought on board certain of their own gear, including a defective block, and

rigged it along with the ship's equipment for the unloading operation. The block broke in the course of discharging the cargo, causing injury to one of the longshoremen. The question before the court was whether or not the ship was responsible for the unsafe condition of the gear as rigged by the stevedores. In that case, as in the *Rogers* case, the shipowner interposed the "relinquishment of control" defense, contending that once he had provided a seaworthy ship to the stevedores, he could not be held liable for any unsafe conditions thereafter occurring. The opinion of the Court of Appeals, as affirmed by this court in its per curiam opinion, in considering this issue, states (p. 479):

"Appellee argues that even if the unseaworthiness of the block is shown, it is not liable because control of that portion of the ship upon which Petterson was working had been surrendered to Stevedoring Co. In so contending they rely, as did the court below in its decision, upon the 'relinquishment of control' doctrine which has been adopted in the Second and Third Circuits. That doctrine is that a shipowner is under an initial duty to provide a seaworthy ship; but that this duty is a concomitant of control, and the shipowner is not liable for unseaworthiness which arises after control of the ship, or that part which includes the unseaworthy condition, has been surrendered to the stevedores.

. . .

(p. 480)

"Judge Hand was correct in his interpretation of the *Sieracki* case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the *Sieracki* opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from the shipowners

'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.' 328 U. S. at page 99, 66 S. Ct. at page 879. *The duty of the shipowner is described, 328 U. S. at page 95, 66 S. Ct. at page 877, as 'a form of absolute duty owing to all within the range of its humanitarian policy' and further, 328 U. S. at page 100, 66 S. Ct. at page 880, as 'peculiarly and exclusively the obligation of the owner. . . . one he cannot delegate.'* It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner pro hac vice." (Emphasis supplied.)

Regarding the so-called "relinquishment of control doctrine" the court went on to say (p. 480):

"That this absolute duty is also owed to stevedores is clearly shown by the Sieracki case. See also *Kulukundis v. Strand*, 9 Cir., 202 F. 2d 798, 710. *The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here.*" (Emphasis supplied.)

That decision was affirmed per curiam by this court upon the authority of *Seas Shipping Company v. Sieracki*, supra, 328 U. S. 85, and *Pope and Talbot v. Hawn*, 346 U. S. 406.

This court in the *Petterson* and *Rogers* cases, thus, again rejected the further attempt to drive a wedge between the seaman and the longshoreman in connection with the shipowner's duty under the warranty of seaworthiness.

Implicit in those two decisions of this court is the proposition that longshoremen are assimilated to the position of seamen and they share equally the full benefits of the warranty of seaworthiness. The shipowner's duty is to "supply and keep in order the proper appliances appurtenant to the ship." *Mahnich v. Southern S. S. Co.*, *supra*, at U. S. page 104; *The Osceola*, 189 U. S. 158, 175. This duty is neither limited by concepts of negligence nor contractual in character, and "is peculiarly and exclusively the obligation of the owner . . . one he cannot delegate." *Seas Shipping Company v. Sieracki*, *supra*, at U. S. pp. 94-95, 100.

Prior to the *Petterson* decision, there was a lack of consistency in the decisions of the Second Circuit, as there was in the Third. In one line of cases, the court held that the shipowner's obligation of seaworthiness was limited to providing an initially seaworthy vessel which terminated the moment "control of the vessel was surrendered to the stevedore." *Lynch v. United States*, 163 F. 2d 25, cert. den. 326 U. S. 743; *Lauro v. United States*, 162 F. 2d 32. Opposed to these cases is the opinion of Judge Learned Hand in the *Lauro* case where although concurring in the result because the ship was initially unseaworthy, he expressed the same conviction that under the decision of this court in *Seas Shipping Company v. Sieracki*, *supra*, and *The Osceola*, *supra*, the shipowner's duty continues throughout the period the stevedores are aboard the vessel. Consistent with this view is the Second Circuit decision in *Grillo v. Royal Norwegian Government*, *supra*, 139 F. 2d 237, where the sole defense to a longshoreman's action for personal injuries, sustained because of a defective ladder over the ship's side, was that the ladder was not shown to have been part of the gear or to have been placed there by any authorized person on behalf of the ship. That defense was rejected. See also *Standard Oil Co. v. Robins Drydock & Repair Co.*, 25 F. 2d 339, and *Larsen v. United States*, 72 F. Supp. 137.

Following the *Petterson* and *Rogers* decisions, the Court of Appeals for the Second Circuit consistently conformed to the principles of those cases. The specific subject matter was again presented to the Second Circuit in *Grillea v. United States*, *supra*, 232 F. 2d 919. There the longshoremen were engaged in replacing the hatch boards after the work in the hold had been completed. As the hatch boards were set in place upon the beams, one of the boards came to rest upon a padeye protruding above the top of the beam, causing the board to be unsteady. As the longshoremen continued to replace the other hatch boards, one of the longshoremen was caused to lose his balance when he stepped upon the unsteady board, as a result of which he fell into the hold suffering injury. The court held the shipowner liable for the unsafe condition on the basis of this court's decisions, in *Sieracki*, *Hawn* and *Petterson*. The court stated that implicit in those decisions is the principle that it is the shipowner's non-delegable duty throughout the course of the vessel's operation to provide and keep in order a seaworthy vessel and equipment, and it is no defense to the shipowner that the condition may have been created by the longshoremen. Judge Learned Hand, speaking for the court, held further that the shipowner would be liable for the unsafe condition, even if it had been caused by the injured man himself, although under the latter situation the recovery would be reduced *pro tanto* under the comparative negligence rule. The opinion of the Court of Appeals states (p. 922):

"The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'pad-eye' the ship became *pro tanto* unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doc-

trine of *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, to longshoremen, while loading or discharging a ship. The respondents answer that a ship's seaworthiness has from time immemorial been measured by her fitness for the service in hull, gear and stowage, that in all these respects the ship at bar was well provided, and that the libellant's injuries were due solely to the negligence of himself or his companion, Di Donna, or both, in selecting the wrong hatch cover to place over the 'padeye'.

(pp. 922-923)

“ . . . In the case at bar although the libellant and his companion, Di Donna, had been those who laid the wrong hatch cover over the 'pad-eye' only a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; *it had become part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.* It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect.

"The Court recently reaffirmed this doctrine in *Alaska S. S. Co. v. Petterson*, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, and we have since followed suit in *Poignant v. United States*, 2 Cir., 225 F. 2d 595. *Seas Shipping Co. v. Sieracki*, supra, also held that the contributory negligence of a seaman is not a defense to an action based on the ship's unseaworthiness; although apparently it is a proper factor in fixing the amount of the recovery. *Pope & Talbot v. Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143."

It is apparent that the decision of the court below collides head on with the principles laid down by this court in the *Sieracki*, *Hawn* and *Petterson* cases, and with the decisions of the Courts of Appeals interpreting those decisions.

The instrumentality which caused the accident in this case was the defective rigging of the boom and tackle for the purpose of unloading the lumber. That it was a defective and dangerous condition was specifically found by both the trial court and the Court of Appeals; that this defective instrumentality was a proximate cause of the accident was likewise found by both courts below. Under these circumstances, it was immaterial that the unsafe instrumentality was rigged by the longshoremen. The shipowner should have been held liable in any event because of its non-delegable duty.

Chief Judge Biggs, in dissenting in the instant case, pointed out that the holding of the Court of Appeals is in direct conflict with the *Sieracki*, *Hawn*, *Petterson* and *Grillea* cases, and that the principles enunciated in those cases:

"Would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine

to the effect that a 'seaworthy' round peg placed in a 'seaworthy' square hole will render the whole unseaworthy." (Emphasis supplied.)

Upon this ground alone, the decision of the court below should be reversed.

II.

The Court of Appeals Reversed the Findings of Fact of the Trial Court Without Applying the Standard That Such Findings Must Be Clearly Erroneous Upon a Review of the Entire Record.

In reviewing a judgment of a trial court sitting in admiralty without a jury, a Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunal in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6; *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F. 2d 441, 444 (CA 1); *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850, 854 (CA 5); *Union Carbide & Carbon Corp. v. United States*, 200 F. 2d 908, 910 (CA 2); *Koehler v. United States*, 187 F. 2d 933, 936 (CA 7).

A review of the decision below upon this ground is sought not because the Court of Appeals chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all of the evidence in the record. Parenthetically, it may be stated that this court stands in review in precisely the same position as did the Court of Appeals. *McAllister v. United States*, *supra*, at U. S. 20-21, L. Ed. 24. If there be competent evidence, unless the court is left with the firm conviction upon a review of the entire record that a mistake has been made, the findings of the trial court must stand. *McAllister v. United States*, *supra*, at U. S. page 20, L. Ed. page 24.

In the McAllister case, a ship's officer sought recovery from the vessel owner for polio, allegedly contracted as a result of the latter's negligence. The District Court found that the shipowner was negligent, but the Court of Appeals reversed on the ground that this negligence was not shown to have been the proximate cause of the disease. The Supreme Court, after stating the rule regarding the scope and nature of review, concluded that although the Court of Appeals had recognized the proper standard for review, it erred, nevertheless, in the application of that standard. In this connection, this court said (U. S. pp. 20-21, L. Ed. p. 24):

"We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard. In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court are *clearly erroneous*." (Emphasis supplied.)

Upon its own review of the record, this court concluded (U. S. pp. 22-23, L. Ed. p. 25):

"Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. *But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous.*" (Emphasis supplied.)

The findings of the district judge were, therefore, reinstated, despite the fact that the Court of Appeals reached a different view. The controlling factor was not whether there was evidence to support the Court of Appeals' view, but whether the District Court's findings were "clearly erroneous."

In the case at bar, the Court of Appeals did not follow the standard prescribed by this court for the review of the trial court's findings in that its decision in this regard is based upon a unique theory which finds no support in the record and which, in fact, is contradicted by the testimony of all witnesses, including the respondents'.

In reversing the trial court's finding that the winch was unseaworthy, the Court of Appeals said that the finding *was* supported by the evidence but that, nevertheless, the application of its own mathematical formula to the "undisputed facts requires the rejection of that opinion and the acceptance of other testimony."⁴ The "undisputed facts" upon which the court below relied, and upon which the entire mathematical formula is based, is stated by the court below is (R. 112-113):

"... The testimony was clear and undisputed that the hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage."

4. The court also indicated that a Coast Guard Regulation, 26 C. F. R. Part 111.45-20 (b2) made the setting of the cut-off device at twice the rated load permissive, but this regulation does not refer to ships' winches expressly or impliedly. It has to do with current supplied to lights and water coolers, etc., not involving any strain on gear as is involved in the operation of a ship's winch. Inquiry at the Coast Guard and the Maritime Administration, which designs the plans for the construction of vessels and gear, discloses that there is no regulation which governs the cut-off devices on the ship's winches.

It will immediately be apparent that the court labored under a complete misunderstanding regarding the so-called undisputed facts, and, moreover, the mathematical formula which it introduced into the case is not only contrary to all the evidence in the record, but it is most defective from the scientific point of view.

The statement that the hoisting gear is rated to lift a load of not more than one-fifth of the strength of the cable itself is not supported but is contradicted by the evidence. At the outset, it must first be noted that the cable is an integral part of the "hoisting gear" and the cable as well as all the rest of the gear used in the hoisting operation had a rated safe working capacity of *three* tons. How did the Court of Appeals reach the conclusion that it had a fifteen ton capacity with the ability to *adequately* withstand a strain of fifteen tons? This was erroneously inferred from the testimony of witnesses that the gear was designed with a factor of safety five times its safe working capacity. Without alluding further to the testimony, the court *assumed* that the *factor of safety* means *safe working capacity*. This finding which the court below referred to as undisputed fact is absolutely contrary to the testimony of the witnesses, as well as to generally accepted scientific principles. The experts testified that a factor of safety related to the "*breaking point*" of the cable and not its working *capacity*. The fallacy in the lower court's assumption on this point is demonstrated forcibly by the respondents' own experts. Isaac Stewart, an expert witness who appeared for the respondent vessel, testified as follows (R. 74-75):

"The Court: May I interrupt you a moment, Mr. Brass? While we are still on this safe working load, did I understand you to say that the safe working load of a wire rope is one-fifth of its tensile strength?

"The Witness: *Breaking load*, yes, that is a new a new rope.

"The Court: Now as the deterioration increases in the wire rope the *breaking load* decreases, does it not?

"The Witness: That is right." (Emphasis supplied.)

Another expert, Walter J. Byrne, testified on behalf of the impleaded respondent in these terms, which likewise destroy the very foundation upon which the extraordinary theory of the Court of Appeals below rests (R. 86-87):

"Q. Mr. Byrne, what is the factor of safety on a runner?

A. Five.

Q. Five what?

A. In order to determine the safe working load you divide the breaking strength by five.

Q. In other words, the safety—the safe working load—

A. Is one-fifth.

Q. And if you say it is a hundred per cent over the safe working load it is a drastic condition. Is that what you are testifying to now?

A. Yes."

Q. In other words, you say it is drastic even though the safe working load is one-fifth of the breaking load, is that right?

A. That is correct. I am a safety engineer. One pound over the safe working load in my opinion is bad.

The Court: While you are thinking of the form of your question, let me ask this question. As I understand it, this safe working load is what its name implies, namely, a limitation on the recommended load to which a member of the gear or unit of the gear should be subjected so as to afford a maximum safety tolerance or cushion.

The Witness: Yes, in order to take—also take into account deficiencies, things of that kind, which might occur.

The Court: If you have a given breaking strength of a wire and you have computed the safe working load of that wire as one-fifth of that breaking strength, if by reason of the condition of the wire the breaking strength is reduced, is the safe working load proportionately reduced? Do you understand my question?

The Witness: I do, your Honor, and of course there again it is from the practical aspect. If the breaking strength is substantially reduced due to wear or due to other factors, obviously the safe working load has to be reduced.

I mean it would be inconceivable to think otherwise, that if the wire had deteriorated to the extent that the breaking strain has been weakened, it would be foolhardy to continue the original one-fifth of sound wire breaking strain”

It is thus apparent that the court below not only erred in confusing “factor of safety” with “working capacity”, but also that its novel theory, which is the product of its own reasoning, is fundamentally unsound to the point where it may be so judicially noted. The Court of Appeals went outside the record in evolving that theory. This court may, therefore, take judicial notice of generally recognized scientific principles in examining into it.

In the manufacture of materials which are intended to be subject to stress and strain, the manufacturer must determine the safe capacity of the product, or, to put it otherwise, the amount of strain that it can adequately withstand without suffering any irreversible damage. In arriving at this figure, the manufacturer will test the product by exerting more and more strain until the product finally breaks. Obviously, before this breaking point is reached,

the substance or body of the product begins to suffer progressively more and more damage as the strain increases until the entire body of the product completely snaps. A simple experiment with a length of twine or a piece of wood will illustrate the point. If the strain is stopped before the breaking point is reached, the product may, nevertheless, be weakened by a partial break internally or externally, or any number of fibers may be torn, depending upon how close to the breaking point the strain is continued. This would leave the product in a weakened condition and thereby reduce the level of the breaking point. The manufacturer must find the point which is safely below that where the progressive breaking begins. So long as that point is not exceeded the product can be used over and over again without damaging and weakening it. The factor of safety means exactly that. It does not mean that the product has a safe working capacity at a higher level. That would be testing the risk. On the contrary, when the manufacturer specifies on the product, as here, that the gear has a safe working capacity of three tons, it means that it has been tested and that it may be dangerous to apply a greater strain because the progressive damage to the product begins somewhere above that level. The safe capacity of the product ends at the point that the manufacturer specifies. The level of the breaking point under no circumstances represents the safe capacity of the gear as the Court of Appeals reasoned, contrary to the evidence.

The trial judge found that the topping lift cable which was manufactured with a safe work load capacity of three tons was in fact subjected to an excessive strain of between 17 and 21 tons; that this excessive strain was due to two factors: (a) the excessive setting of the cut-off device which failed to stop the winch when the weight of the load exceeded three tons; and (b) the defective condition of the rigging which placed a somewhat greater strain on the topping lift than on the other gear; that these factors combined to cause the cable to break. That court held the

winch to be unseaworthy and a material contributing factor to the accident. Those findings are fully supported by competent evidence, and the record does not sustain any conclusion that they are clearly erroneous.

The Court of Appeals did not hold that the trial court's findings were clearly erroneous, but simply substituted its judgment for that of the trial judge. In so doing, it violated the standard laid down by this court in the *McAllister* case. The record demonstrates that the findings of the trial judge are not "clearly erroneous" and the Court of Appeals committed error in reversing them.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,

SIDNEY A. BRASS,

Counsel for Petitioner.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.

FILED

MAY 23 1958

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1958

No. ~~60~~ 61

JOHN H. CRUMADY,

Petitioner,

AGAINST

JOACHIM HENDRIK FISSER, Her Engines, Tackle,
Apparel, etc., and **JOACHIM HENDRIK FISSER**
and/or **HENDRIK FISSER,**

Respondents,

AGAINST

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**Brief of Respondents in Opposition to Petition for a
Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

JOHN H. DOUGHERTY,

Proctor for Respondents,

Warner Building,

Washington 4, D. C.

VICTOR S. CICHANOWICZ,

CHARLES N. FIDDLER,

On Brief.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statement	2
Statement of the Case	6
Reasons for Denying the Writ	14
Conclusion	21

CASES CITED

Berti v. Compagnie De Navigation Cyprien Fabre, 2 Cir., 213 F. 2d 397	17
Bondoin v. Lykes Brothers Steamship Co., 348 U. S. 336	15
Freitas v. Pacific-Atlantic Steamship Company, Inc., 9 Cir., 218 F. 2d 562	17
Grillea v. United States, 232 F. 2d 919	15, 16
Just v. Chambers, 312 U. S. 383, 385	14

	PAGE
Magnum Co. v. Coty, 262 U. S. 159, 163	17
Mahnich v. Southern Steamship Company, 321 U. S. 96	16
Manhat v. United States, 2 Cir., 220 F. 2d 143, cert. den. 349 U. S. 966	17
McAllister v. United States, 348 U. S. 19	19
Petterson v. Alaska S.S. Co., 205 F. 2d 478, 479, affirmed sub nom. Alaska Steamship Co. v. Pet- tersen, 347 U. S. 396	15, 16
Pope & Talbot v. Hawn, 346 U. S. 406	15, 16
Rogers v. United States Lines, 205 F. 2d 57, re- versed 347 U. S. 984	16
Seas Shipping Co. v. Sieracki, 328 U. S. 85	15, 16, 20
The Arizona v. Anelich, 298 U. S. 110	20
The Daisy, 282 F. 261	17, 19
The Osceola, 189 U. S. 158	16, 17, 19
Virginia Ry. Co. v. Mullens, 271 U. S. 220, 227, 228	14

OTHER AUTHORITIES CITED

Coast Guard Regulation 46 C.F.R. Part III 45-20(b2)	7
Jones Act, 46 U. S. C. A. 688	20

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is reported at 142 F. Supp. 389. The opinion of the Court of Appeals for the Third Circuit is reported at 249 F. 2d 818. The opinion of the Court of Appeals on the petition for a rehearing is reported at 249 F. 2d 821.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254(1). However, the petition fails to establish that there exist any of the grounds for granting a writ set forth in Rule 19 of the Revised Rules of this Court.

Questions Presented

1. Whether this Court should review a theory which was not advanced below and which requires the rejection of findings concurred in by the courts below and substitution of new findings therefor based on matters having no foundation in the record.
2. Whether this Court should review the decision of the Court of Appeals because on an application for a rehearing, it refused to adopt a theory of liability which was not advanced in the trial court or on appeal and was foreign to the general maritime law and was in conflict with the whole rationale of the decisions of this Court on the subject.
3. Whether this Court should, on the basis of statements outside the record, review a reversal by the Court of Appeals of a holding by the trial court which was unsupported by the evidence, contrary thereto and contrary to law where the findings of the trial court and the undisputed facts show that the holding of the trial court was clearly erroneous.

Statement

It is necessary to point out at the outset that the petition does not present accurately the true issues in this case but attempts to obtain a review of matters which were not advanced below but have been formulated solely for the purpose of this proceeding. Furthermore, it challenges the findings of the court below not on the basis of the record but by resorting to expressions of personal opinions and beliefs which have no foundation in the record and are contrary thereto.

Each of petitioner's arguments is based on the false premise that the only part the stevedores played in causing his accident was that of changing the position of the boom and that this was their only connection with the creation of the excessive strain which caused a safe and seaworthy topping lift cable to break. Nowhere in the entire petition does petitioner even acknowledge that, in fact, the trial court concluded as a matter of law that the sole, active and primary cause of the excessive strain on the topping lift was the negligent manner in which the longshoremen attempted to extract a timber, which they had permitted to jam on the underlip of the vessel's hatch coaming, from such obstructed position beneath the deck of the vessel (142 F. S. 389, 401). As to this finding, with which the Court of Appeals concurred (249 F. 2d 818, 819), the petition is significantly silent.

Having omitted this vital finding, petitioner formulates his own theory as to why the Court of Appeals exonerated the vessel. At page 11 of the petition, petitioner asserts that the sole basis upon which the holding of the lower court, exonerating the shipowner, rests is that the shipowner temporarily surrendered control of the vessel to the intermediate employer. He then attacks the holding

of the Court of Appeals on this theory and urges not only that a writ be granted but also that this Court reverse the decision below on the ground that the holding is contrary to certain decisions of this Court and other lower courts which had dealt with the "concept of control" theory. This part of petitioner's argument, however, is misdirected because the Court of Appeals did not exonerate the vessel on the basis of a temporary surrender of control but *"because the gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident which occurred"* (249 F. 2d 818, 821). (Emphasis supplied.)

Again omitting the vital finding as to the real cause of the excessive strain, the petitioner at page 27 of his petition asserts that the trial judge found that "the excessive strain was due to two factors: (a) the excessive setting of the cut-off device which failed to stop the winch when the weight of the load exceeded three tons; and (b) the defective condition of the rigging which placed a somewhat greater strain on the topping lift than on the other gear; that those factors combined to cause the cable to break". This, however, again was not the finding of the trial court as to the cause of the strain. Instead, the trial court held that after the longshoremen had caused the timber to become jammed, "the continued application of power to the winch imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall". Nor did the trial court hold that the manner of rigging combined with the setting of the cut-off device cause the cable to break. The only way in which the setting of the cut-off device became involved, according to the trial court, was that it was "brought into play" by the stevedores' failure to exercise care in conducting the unloading operations.

The Court of Appeals properly held that under such circumstances the setting of the cut-off device was not established as a legal cause of the accident and that it did not render the vessel unseaworthy because "The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose" (249 F. 2d 818, 821). Seaworthiness does not require that a ship or its gear should be fit for a use for which they were not intended or that they be capable of preventing an eventuality that cannot be reasonably feared or anticipated.

Even petitioner's "Statement of the Facts" obscures the real cause of the breaking of the topping lift cable. It is made to appear that the strain on the topping lift was not due to the attempt of the longshoremen to force the blocked timber but because the cut-off device did not anticipate and prevent the occurrence of the accident. The petitioner describes the occurrence of the accident at page 9 of his petition as follows:

"Prior to the accident, the stevedores were in the course of hoisting two timbers from a hold of the vessel, when one end of the timbers became wedged and caught under the hatch coaming. As the power in the winch increased the strain on the cables pulling the load, the cut-off device failed to shut off the power within the safe working limits of the gear, and the increasingly excessive strain finally caused the topping lift to break. As a result, the boom fell upon the longshoreman."

Petitioner would have it appear that the fault lay with the cut-off device and not the longshoremen who, being in control of the winch, refused to stop the winch even though further movement of the timber was effectively blocked. Nor is there anything in this statement which indicates

that the longshoremen were using the ship's gear for a purpose for which it was not intended, i.e., to force the timber after they had caused it to become caught on the under-edge of the hatch coaming. Instead, it is made to appear that the winch was being operated in a normal manner and that the overstrain arose during the course of that operation and not as a result of operating the winch in an improper manner.

The petitioner would also have it appear that the court below, which heard the initial appeal, was in error because it denied a rehearing. The petitioner merely asserts that the majority of the court dismissed his contention that the vessel must be held liable even if the sole cause of the accident was defective rigging by the longshoremen as being without merit and without further comment. The majority, however, stated (249 F. 2d 818, 821):

"A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for a rehearing is denied."

That theory was not only different from the one on which the petitioner had originally proceeded in the courts below¹ but also necessitated omissions of findings previ-

1. The Court of Appeals 249 F. 2d 818, 819 pointed out that in the libel petitioner asserted a claim for injury based on the negligence of a ship and its owners and nothing else. On the pretrial conference, it was changed to one of unseaworthiness and it was made clear the structure alleged to have been unseaworthy was the topping lift cable. Thereafter, libellant's proof was directed at establishing that the topping lift was worn and defective and, for that reason, *parted under the strain of lifting cargo* which sound gear would have withstood (italics supplied). In the Court of Appeals, on the original appeal,

ously made and required resort to baseless statements having no foundation in the record.² No more compelling reason exists for this Court to re-evaluate the facts to establish a new theory which was not advanced below and which respondent was not required to meet than existed below. The dissent of Chief Judge Biggs furnishes no basis for the granting of a writ here. He did not hear the original appeal and obviously was not fully apprised of the fact that the trial court had found that it was the stevedores' misuse of the ship's gear which was the sole and primary cause of the overstrain on the topping lift.

Statement of the Case

On January 1, 1954, the *SS Joachim Hendrik Fisser*, a German built vessel which had been constructed in 1952, arrived at Port Newark with a cargo of lumber and timbers from Puerto Cabezas, Nicaragua. The respondent vessel was a small dry cargo ship which had only two cargo hatches, one hatch being forward of the midship housing and the other hatch being aft of the midship housing. The two winches and the two booms at the forward or #1 hatch, at which the libelant and his co-workers did the discharging, were located forward of the #1 hatch.

In accordance with international practice, each of these booms contained a marking that the lifting gear and attachments were certified for a safe working load of three tons.

petitioner still vigorously contended that no negligence of the stevedores caused or contributed to the accident. At this time, he had switched to the contention that the cut-off device was defective.

2. The same baseless statements having no foundation in the record which appear at page 23; footnote 4, were advanced in an attempt to destroy the Coast Guard regulation regarding which two experts had testified without contradiction on the trial.

In accordance with international practice, this was notice to all that in no event was a greater load than three tons to be lifted by this gear.

The power for the lifting gear was supplied by electric winches. They were powered by electric motors with a rated capacity of 18 German horsepower each. In its electrical unit each of the winches was equipped with an electromagnetic instantaneous type cut-off device or circuit breaker. The purpose for which these circuit breakers were installed was to protect the electric motor from burning out when an excessive current might be built up. In other words, they performed the same function as the ordinary household fuse. They had been adjusted by the electrical contractor who installed them and were correlated with the ship's gear after it had been tested. In this case, the cut-off device was set so that the flow of current to the winch motor would be cut off instantaneously when the amperage reached the point where it would be equivalent to the current which the motor would require to overcome the strain of a load on the cargo runner somewhat in excess of six tons. This setting as the Court of Appeals noted was in accord with Coast Guard Regulation 46 C.F.R. Part III. 45-20(b2), which allowed a setting at a point up to 250% of full load current.³

Prior to 8 A.M. on January 2, 1954, the vessel's crew raised the port (up-and-down) boom and rigged it in a position with its head above and perpendicular to a point in the center line of the hatch square of hatch #1. When the longshoremen came on board at 8 A.M. on January 2, 1954, they first moved the starboard or burton boom so that its head was over the side of the vessel and above the

3. 250% of full load current would allow a load on the runner of 7½ tons. The setting in the present case limited it to a little over 6 tons.

pier and then proceeded to discharge lumber and timbers from hatch #1. Before they started discharging, the winchman conceded that one of the members of the crew had shown him a switch by means of which he could shut off the power of the winch.

For approximately one hour the longshoremen discharged lumber and timbers from #1 hatch. This discharging was done in the following fashion: The longshoremen first made up a draft of lumber or timber in the hatch and placed wire slings around it. They then hooked the two wire falls which were joined at the lifting end to the slings which were around the draft—one wire fall ran through a block which was at the head of the starboard (burton) boom which had been rigged over the deck and down through a block at the foot of the starboard (burton) boom and around the drum of the starboard winch, and the other passed through a block at the head of the port (up-and-down) boom which was over a point in the center line of the hatch square of #1 hatch, down through a block at the foot of the port (up-and-down) boom and around the drum of the port winch. By first applying the power of the port winch, the draft was raised upward and out of the hatch and then by applying the power of the starboard winch, the draft was transported across the deck of the vessel and lowered down onto the pier by reversing the raising operation and letting up on the runners.

After working in this manner for approximately one hour and just immediately prior to the occurrence of petitioner's accident, the longshoremen, apparently in order to establish a more lateral pull for removing timber from under deck, switched the position of the port (up-and-down) boom so that the head of the boom was then above and perpendicular to a point on the vessel's deck two feet to the port of the port coaming of #1 hatch.

Immediately after the port (up-and-down) boom was moved into this position, the longshoremen attempted to lift two timbers, which measured from 8" x 8" to 12" x 12" in girth and from 30 to 37 feet in length, from the vicinity of the starboard side of the hatch. One of these timbers lay in the open square of the hatch just outside the starboard hatch coaming. The other timber lay about two feet to the starboard of this timber and beneath the overhang of the starboard main deck and just inside the lower projection of the starboard vertical coaming (on the in-shore side).

The libelant and a fellow employee placed a double-eyed wire rope sling around these two timbers at a point some two or three feet from the after ends of these two timbers and the two eyes of the sling were then placed upon the cargo hook of the fall which extended from the head of the port (up-and-down) boom in a diagonal towards the starboard after end of the hatch where this sling around the timbers was located. As soon as this was done, libelant's co-worker gave two signals to the port (up-and-down) winchman. The first was to take up the slack on the fall. After that was done, a second signal was given to lift the timbers.

However, as found by the trial court:

" . . . , either the taking of the slack or the taking of the strain by the port winchman on the sling which was around the two timbers caused the in-shore timber to turn or roll (rather than slide) toward the off shore edge of the underlip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch

imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall."

With respect to petitioner's sole theory of liability that the topping lift cable which supported the boom parted because it was worn and defective and, therefore, parted under the strain of lifting cargo which a sound topping lift cable would have withstood, the trial court made the following finding:

"Since I am persuaded that the topping-lift which failed, and its condition, is exemplified in the exhibits R-38 and R-39, and since the testimony is uncontradicted that the topping-lift had been in use since the initial rigging of the vessel in June 1952, apparently with the same boom and a cargo runner of the same rated capacity as at the time of the accident, I find that the topping-lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended."

From the evidence, the trial court also found that the topping lift parted because a strain of between 17 and 21 tons, or several times the safe working load of the topping lift and other units comprising the unloading gear, had been imposed on it.⁴

4. This finding and the evidence on which it is based conclusively establishes that the mathematical formula used by the Court of Appeals, by which it arrived at a safe working capacity of 15 tons and which petitioner attacks as incorrect by resorting to what he calls recognized scientific principles set forth at pages 26 and 27 of the petition, is correct. The topping lift cable here did not break until it was subjected to a strain of at least 17 tons and possibly as much as 21 tons. The progressive damage did not begin until the strain was greater than 15 tons. To hold otherwise requires the rejection of the trial court's findings and a reappraisal of the evidence.

Having found that the topping lift cable was adequate and proper for the loads for which the gear was designed and intended, and having found that the topping lift parted because it had been subjected to a strain in excess of its safe working capacity and that this excessive strain which caused the topping lift cable to break was caused by the continued application of the power of the winch after the timber had become effectively blocked from further movement, the trial court in the words of the Court of Appeals, 249 F. 2d 818, 819, then:

“ * * * found and adopted a new theory of ship's unseaworthiness and responsibility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. * * * ”

Under this theory, the trial court labored under the erroneous concept that the warranty of seaworthiness required that ship's gear not only be reasonably fit for its intended purpose but that it also be fit for any eventuality whether it could be reasonably anticipated or not. On the basis of this erroneous concept, the trial court held that the vessel was liable to the petitioner because the negligence of the stevedores brought into play an unseaworthy condition of the vessel and then awarded indemnity to the vessel against the stevedore because the stevedore had breached the duty which it owed to the vessel to exercise reasonable care in conducting its unloading operations.

The Court of Appeals, after concurring with the trial court that the stevedores were negligent in their conduct of the unloading operations, reversed the trial court and dismissed the libel. Having absolved the vessel of liability, the Court of Appeals pointed out that it did not reach the question of whether there would have been legal basis for making the stevedore an indemnitor.

In dismissing the libel, the Court of Appeals pointed out that it was doing so because the vessel's gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as the legal cause of the accident which occurred.

In its opinion, the Court of Appeals also noted that by changing the position of the head of the boom, the longshoremen distorted the normal composition of forces which is presented by a straight lifting operation. However, the strain of between 17 and 21 tons which the trial court found as a fact, on the basis of expert testimony, did not result from the changing of the position of the boom. Instead, it arose from the strain which was produced on the boom head by the jamming of the timber and the continued operation of the winch. When the timber became jammed and the longshoremen continued to apply the power of the winch, the head of the boom was then being subjected to two forces. One force was in that portion of the runner passing from the jammed timber to the head of the boom and the other from the head of the boom down to the winch. In this way the head of the boom was pulled downward as the power of the winch continued to be applied. The load exerted on the boom head would be the resultant of these two forces which would be translated from the boom head into the topping lift which supported the boom. The force obviously would keep pulling the head of the boom further and further downward. On the other hand, if the timber was not jammed, the only force on the boom head would be that exerted by the load being lifted (N.T. 1443-1446).

This principle can be easily demonstrated by attaching a weight to a piece of string and then passing the string over some object such as a pencil held in a horizontal position. By pulling on the other end of the string, it will be noted that as the weight rises, the pencil is subjected only

to the strain necessary to raise the weight. If the weight, however, is secured to something or jammed so that it cannot move and the other end of the string is pulled, the pencil is subjected to the strain not only of the pull on the string but also by the jamming of the weight and the pencil will be pulled downward.

Thus, even with the position of the boom head altered, the excessive strain still could result only from the application of the power of the winch as the longshoremen tried to force the jammed timber. Therefore, the conclusion of the court below that the gear was not proved unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident was correct, and its denial of the petition for a rehearing on the basis that there was no merit in the contention made by the petitioner was in all respects proper. In his dissent, Chief Judge Biggs clearly indicated that he was not aware of the real factors which produced the overstrain on the topping lift cable and caused it to break. The present case in no sense involves a question of how long a time elapsed between the positioning of the boom and the occurrence of the accident, nor is it a case for the application of the doctrine to the effect that "a 'seaworthy' round peg placed in a 'seaworthy' square hole will render the whole unseaworthy". It is a pure and simple case of an accident occurring from the use of the ship's equipment for a purpose for which it was not furnished or intended and in failing to stop the winch after it was obvious that the timber was so effectively blocked that unless it was stopped some part of the ship's gear would break.

Reasons for Denying the Writ

(1) The theory on which the petitioner seeks a review in this Court was not advanced in the trial court nor on the original appeal and is without merit because it requires the omission of a finding concurred in by the courts below. Nor is it based on a theory which the respondent was required to meet below. Petitioner would have it now appear that the accident resulted from a proper use of ship's gear and that a defect in the gear caused the accident. The courts below, however, concurred that the excessive strain which was imposed on the vessel's topping lift was produced by the continued application of power to the winch after the timber had become jammed against the hatch coaming and all further movement of the timber had been effectively blocked. It is well established that on appeal the petitioner cannot change his theory to one which was not advanced below and which the respondent was not required to meet below and on such a basis obtain a review by this Court. *Virginia Ry. Co. v. Mullens*, 271 U. S. 220, 227, 228. It is also well established that this Court will not review the evidence and make other findings where the courts below have made concurrent findings. *Just v. Chambers*, 312 U. S. 383, 385. Since the granting of a writ here would require the consideration of this matter on a theory not advanced or litigated below, and since it would require the rejection of findings made below which are supported by the evidence, no valid basis exists for granting petitioner's application in the present case.

(2) The issues here are uniquely narrow and turn solely on the facts which are peculiar to this case. They present no conflict of opinion and involve no questions which are of public importance and which require resolution by this Court, despite petitioner's attempt to make it so appear.

The petitioner's argument in his First Point (pp. 6-21 of petition) is based on the erroneous concept that the Court of Appeals absolved the vessel because it temporarily surrendered control of the vessel (p. 11 of petition) and is the result of the omission of the finding that the stevedores' negligent operation of the ship's winch in attempting to extract the timber from its obstructed position beneath the deck of the vessel was the sole, active or primary cause of the accident.

None of the cases referred to in the petition stands for the proposition that the vessel is liable for a breach of warranty of seaworthiness when ship's gear which is adequate and proper for the purpose for which it is intended breaks when put to a use for which it was not furnished or intended.

The Court of Appeals correctly applied the principle that the concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. In *Boudoin v. Lykes Brothers Steamship Co.*, 348 U. S. 336, this Court reiterated this principle when it said at page 339:

"The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is *reasonably fit* to carry the cargo' * * *." (Italics supplied.)

The holdings in *Petterson v. Alaska S.S. Co.*, 205 F. 2d 478, 479, affirmed sub nom. *Alaska Steamship Co. v. Petterson*, 347 U. S. 396; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot v. Hawen*, 346 U. S. 406 and *Grillea v. United States*, 232 F. 2d 919, are not in conflict with the principle applied by the Court below. In each of these cases it was found that either the ship or its equipment or appliances were not reasonably fit for the use for which they were intended.

In *Petterson v. Alaska S.S. Co.*, 205 F. 2d 478, affirmed 347 U. S. 396, the Court of Appeals made special note of the fact that the appliance which broke was used in a customary and usual manner and that it was of a type ordinarily and customarily used and proper for the use to which it was being put upon the occasion in question. The Court found that it broke because it was defective.

In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, the gear which broke and caused the accident was also found to be defective. In its opinion, this Court made specific reference to the fact that the weight being lifted when the accident occurred was well within the working capacity of the gear involved.

Hawn v. Pope & Talbot, Inc., 346 U. S. 406 and *Rogers v. United States Lines*, 205 F. 2d 57, reversed 347 U. S. 984, did not involve accidents arising from use of gear or the vessel for a purpose for which it was not intended. In *Hawn*, the Court of Appeals (198 F. 2d 800) pointed out that the absence of hatch covers in the tween deck of the ship constituted an unseaworthy condition. In the *Rogers* case, the sole question related to the shipowner's liability for the unseaworthy condition of a land fall runner brought aboard by a contractor, and the fact that it was defective was not questioned.

The decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, involves an accident resulting from an unseaworthy condition in the ship's structure and does not involve an accident occurring because of a misuse of the ship's equipment.

The decision of the Court of Appeals is also consistent with the principles laid down by this Court in *Mahnich v. Southern Steamship Company*, 321 U. S. 96 and *The Osceola*, 189 U. S. 158. In the *Mahnich* case, *supra*, the vessel was found unseaworthy because the gear which

caused the accident was found to be "*inadequate for the purpose for which it was ordinarily used*". (Italics supplied.) In *The Osceola*, *supra*, one of the propositions laid down by this Court was that indemnity for unseaworthiness could not be imposed for injuries resulting from the negligence of a fellow servant. Cf. *The Daisy*, 282 F. 261.

The decision of the Court of Appeals is also in conformity with such decisions as *Manhat v. United States*, 2 Cir., 220 F. 2d 143, cert. den. 349 U. S. 966; *Freitas v. Pacific-Atlantic Steamship Company, Inc.*, 9 Cir., 218 F. 2d 562; *Berti v. Compagnie De Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, which involved accidents resulting from use of ship's gear for a purpose for which it was not intended.

Thus, there is no conflict of opinion nor has there been a showing that on the particular facts of this case there are issues of such importance to warrant a review by this Court. The jurisdiction to bring up cases by certiorari was not given for the purpose of merely giving the defeated party in the Court of Appeals another hearing. *Magnum Co. v. Coty*, 262 U. S. 159, 163.

(3) Under the guise of seeking a review of the undisputed facts which by application of mathematics required the Court of Appeals to reject the trial court's reasoning that the vessel was unseaworthy, the petitioner seeks to create the impression of a conflict in the facts by resorting to statements having no foundation in the record and on the basis of such statements requests this Court to reverse the Court of Appeals.

The trial court found that the respondent vessel was unseaworthy on the clearly erroneous assumption that the electrical equipment could not safely impose a strain on the runner greater than that designated as the safe working load. It assumed that the safe working load and safe working capacity of gear was one and the same thing.

However, as the Court of Appeals pointed out (249 F. 2d 818) the testimony showed and the laws of physics teach that inertia, frictions and the normal circumstances of operation make it necessary that substantially more than a three-ton strain be imposed upon the gear before a three-ton load can be lifted and thus the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

The petitioner's contention that the Court of Appeals was incorrect in reversing the trial court is based on two "alleged" conflicts. The first involves a Coast Guard standard which prescribes the setting for circuit breakers on electric motors, which the Court of Appeals found indicated that the setting of the cut-off device in the present case was safe and proper. Despite uncontroverted testimony to that effect in the record, petitioner by means of an improper and baseless statement set forth as footnote 4 at page 23 of the petition having no foundation in the record attempts to discredit this regulation. It is believed sufficient to say, without pointing out the inaccuracies, that they are baseless and untrue and should not be considered by this Court.

Petitioner's second alleged conflict is equally as baseless because it requires the rejection of the trial court's finding, in which the Court of Appeals concurred, that at the time the topping lift broke it was being subjected to a strain of somewhere between 17 and 21 tons and the substitution of a new finding that the strain then being imposed could not be in excess of 15 tons. In order to arrive at such a conclusion, petitioner not only would require the court to go outside the record but requests it to do under the guise of "taking judicial notice of generally recognized scientific principles".

These "scientific principles" are nothing more than self-serving statements of petitioner which, even if true, furnish no basis for reversing the Court of Appeals on the facts of this case. Petitioner would have it appear that in no event can the safe working capacity of equipment be equivalent to five times the safe working load. While it may be true that there is a practice under which the safe working load of gear is calculated on the basis of one-fifth of the breaking strain, in this case the breaking strain was somewhere between 17 and 21 tons and, therefore, the Court of Appeals was correct in holding that the safe working capacity of the topping lift cable was 15 tons. In order to accept petitioner's contention, it would be necessary not only to reject the holding of the Court of Appeals but also the finding of the trial court that the safe working load of the topping lift cable was *at least* three tons.

Thus, in urging that the reversal by the Court of Appeals was not based upon any evidence in the record and that it was in fact in conflict with all the evidence in the record, petitioner is in error. By resorting to statements outside the record, petitioner himself is guilty of the offense of which he improperly accuses the Court of Appeals. It is clearly evident from this procedure of the petitioner that the Court of Appeals not only correctly applied the standard laid down by this Court in *McAllister v. United States*, 348 U. S. 19, but that if it had not it would have committed error. A review of the entire record shows conclusively that there was no evidence to support the findings of the trial judge on the question of seaworthiness and the finding of the trial judge was, therefore, not only clearly erroneous but also contrary to the established law.

(4) Even if petitioner's theory that the rerigging of the boom by the longshoremen, who were his fellow servants, was responsible for the excessive strain on the topping lift could be accepted, it would not entitle petitioner to any indemnity against the vessel.

In *The Osceola*, 189 U. S. 158, one of the propositions enunciated by this Court was that under the general maritime law a seaman had no right to indemnity for injuries resulting from the negligence of a fellow servant. Cf. *The Daisy*, 282 F. 261. It was because under the general maritime law no recovery for injuries resulting from the negligence of a fellow servant, among others, could be had that the Jones Act, 46 U. S. C. A. 688, was enacted. *The Arizona v. Anelich*, 298 U. S. 110. Since under the general maritime law a seaman could not recover indemnity for the injuries arising from the negligence of a fellow servant and since the whole rationale of *Sieracki v. Seas Shipping Co.*, 328 U. S. 85, rests on the premise that a shipowner cannot escape its obligation under the general maritime law by contracting to have a third party perform the services traditionally performed by seamen, petitioner cannot assert a greater right than seamen have.

CONCLUSION

Petitioner's application for a writ of certiorari should be denied because (1) it seeks a review on theory which was never advanced or passed upon below; (2) it seeks a review on a theory which is in conflict with the findings concurred in by the Courts below and is based on matters having no foundation in the record; (3) it fails to show that under the facts of this case any important reasons exist for the writ; (4) it fails to show that on the facts peculiar to this case there exists any conflict of decisions; (5) under the decisions of this Court, petitioner is not entitled to recovery even under the theory advanced now.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

JOHN H. DOUGHERTY,
Proctor for Respondents.

VICTOR S. CICHANOWICZ,
CHARLES N. FIDDLER,
On Brief.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.

FILED

MAY 27 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~60~~ 61

JOHN H. CRUMADY,

Petitioner,

vs.

**JOACHIM HENDRIK FISSER, her engines, tackle, apparel,
etc., and JOACHIM HENDRIK FISSER, and/or
HENDRIK FISSER,**

Respondents,

vs.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**BRIEF FOR IMPLEADED RESPONDENT IN
OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI.**

JOHN J. MONIGAN, JR.,

Counsel for Impleaded Respondent,

Nacirema Operating Co., Inc.,

744 Broad Street,

Newark 2, New Jersey.

TABLE OF CONTENTS.

	PAGE
OPINIONS OF THE COURTS BELOW.....	1
JURISDICTION	2
QUESTIONS	2
STATEMENT OF THE CASE.....	3
ARGUMENT:	
The decision of the United States Court of Appeals is not in conflict with the decisions of this Court or with any other Court of Appeals	5
CONCLUSION	9

TABLE OF CASES.

	PAGE
<i>Berti v. Compagnie de Navigation Cyprien Fabre</i> , 213 Fed. (2d) 397 (2d Cir. 1954).....	7
<i>Feinman v. A. H. Bull S. S. Co.</i> , 216 Fed. (2d) 393 (3d Cir. 1954).....	6
<i>Freitas v. Pacific-Atlantic S. S. Co.</i> , 218 Fed. (2d) 562 (1955)	7
<i>Grillea v. United States</i> , 232 Fed. (2d) 919 (2d Cir. 1956)	8
<i>Mahnich v. Southern S. S. Co.</i> , 321 U. S. 96 (1944)....	6
<i>Manhat v. United States</i> , 220 Fed. (2d) 143, cert. den'd. 349 U. S. 966 (1955).....	6
<i>The Osceola</i> , 189 U. S. 158 (1903).....	5
<i>Petterson v. Alaska S. S. Co.</i> , 347 U. S. 396 (1954)....	6, 7
<i>Poignant v. United States</i> , 225 Fed. (2d) 595 (2d Cir. 1955)	8
<i>Seas Shipping v. Sieracki</i> , 328 U. S. 85 (1946).....	5, 6, 8

TABLE OF STATUTES.

28 U. S. C. §1254 (1)	2
33 U. S. C. A. §901 <i>et seq.</i> , 44 Stat. 1424.....	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 968

JOHN H. CRUMADY,

Petitioner,

vs.

JOACHIM HENDRIK FISSE, her engines, tackle, apparel, etc.,
and JOACHIM HENDRIK FISSE, and/or HENDRIK FISSE,
Respondents,

vs.

NACIREMA OPERATING Co., INC.,

Impleaded Respondent.

**BRIEF FOR IMPLEADED RESPONDENT IN
OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI.**

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported in 142 Fed. Supp. 389, (L16a)¹. The opinion of the Court of Appeals for the Third Circuit is reported in 249 Fed. (2d) 818 (LP29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 Fed. (2d) 821 (LP36).

¹ References are: L—libellant's appendix; LP—libellant's petition for certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1957, (LP35). The order denying rehearing was entered on December 5, 1957: The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions.

1. Does not the determination of the Court of Appeals that the vessel was not unseaworthy upon the theory advanced by the petitioner in the trial court preclude the assertion of a different theory of unseaworthiness in this Court?

2. If a new theory of unseaworthiness is asserted by a petitioner after the trial of an action in admiralty, should not the case be remanded to the District Court for factual findings after a full opportunity is given to all parties to be heard?

Statement of the Case.

It is not disputed that on January 2, 1954, the petitioner, while in the course of his employment with the respondent impleaded as a longshoreman, was discharging a cargo of lumber from the *Joachim Hendrik Fisser* which was alongside a bulkhead at Port Newark, New Jersey, on the navigable waters of the United States.

It also is not disputed that the petitioner, together with other longshoremen, came aboard the vessel at approximately 8:00 a.m. on the day of the accident and was working in the No. 1 hatch of the vessel at approximately 9:00 a.m. when a wire rope topping lift which was attached to

the port or offshore boom parted. The boom fell into the hatch and struck the petitioner.

To recover for the injuries thus incurred, a libel *in rem* was filed in which it was alleged that the injuries sustained by the petitioner were caused without any fault or negligence on his part but solely through the fault, carelessness and negligence of the claimants (*sic*) and respondents (*sic*) (L8a), and at the pretrial hearing it was stated that the injuries resulted from the unseaworthiness of the vessel, her tackle, apparel and furniture.

The respondent denied that the vessel was unseaworthy, contended it was guilty of no negligence and filed an impleading petition against the impleaded respondent under the 56th Admiralty Rule, seeking indemnity for any damages which would be imposed upon it by the libellant.

At the trial, the testimony offered by the petitioner was directed to two theories upon which a determination that the vessel was unseaworthy could be predicated. One was that Exhibits L-10, and L-13, which were conceded by all witnesses to be in such condition as to render their use as a topping lift unsuitable and dangerous (L19a), were, in fact, parts of the topping lift to which the port boom was attached on the day of the accident. The other theory of liability for unseaworthiness asserted by the petitioner in the trial court was predicated upon the stipulation of the parties that the vessel provided an electric winch which was equipped with a device which interrupted its operation upon the application of a burden exceeding 100% of its capacity. Because of the fact that the gear and booms had a safe working load of 3 tons and the winch, which was the source of the power applied to such gear, had a capacity before the operation of the cutoff device of more than 6 tons, the theory was projected and accepted by the trial

court that the vessel was unseaworthy because of this improper combination of gear (L33a).

The respondent sought to escape liability for the alleged unseaworthiness of the vessel upon the theory that certain of the ship's tackle and gear were moved to a position which was testified to by one of the ship's officers but which was sharply contradicted by the testimony presented on behalf of the impleaded respondent, and, in addition, contended that there was a jamming of two timbers under the coaming of the No. 1 hatch, as a result of which an undue strain was placed upon the topping lift.

The trial court, in its opinion (L30a), recognized the conflicting testimony as to the alleged jamming of the timbers (L20a, L21a) but ignored the conflict in the testimony as to the movement of the gear, stating that it appeared "without contradiction" that the gear was moved to a position (L30a) which imposed an excessive burden upon the topping lift, as a consequence of which the injuries resulted from the active negligence of the impleaded respondent (L33a) so to entitle the respondent to full indemnity against it (L37a).

Its finding in that respect was asserted by the impleaded respondent to be erroneous because of the failure of the trial court to appraise the credibility of the conflict in the testimony in that regard. That circumstance was not reviewed in the Court of Appeals because of the conclusion in that Court that the initial finding of the trial court that the combination of the cutoff device in the winch with the other gear of limited capacity less than that possessed by the winch would not render the craft unseaworthy.

In those circumstances, then, there has been no determination that any action of the employees of the respondent impleaded caused the vessel to be unseaworthy.

In addition to its contention regarding the failure of the trial court to appraise the credibility of the conflicting testimony concerning the position of the gear before the accident, the impleaded respondent raised certain substantial legal objections to the allowance of indemnity against it which were not passed upon by the Court of Appeals because of its conclusion that the vessel was not unseaworthy (LP34).

It is the contention of the impleaded respondent, in light of the testimony presented in the District Court and the theory upon which the case was tried, that the ground of unseaworthiness alleged in the petition for certiorari can not be raised at this stage of the proceedings, or if it is concluded that such a theory can be asserted after the trial of the action and without factual findings thereon that manifest justice requires a remand for findings of fact thereon.

ARGUMENT.

The decision of the United States Court of Appeals is not in conflict with the decisions of this court or with any other Court of Appeals.

Since the decision of this court in *Seas Shipping v. Sieracki*, 328 U. S. 85 (1946), it must be regarded as settled that a longshoreman who is injured aboard a vessel is entitled to the same benefits as those conferred upon a member of the ship's company by reason of the decision in *The Osceola*, 189 U. S. 158 (1903). There is no suggestion in the opinion of the Court of Appeals, for the review of which the present petition has been filed, that it is in any way in conflict with that principle. It is suggested in the petition for certiorari that the decision of the

Court of Appeals in the present case reflects of the so-called "control test" which was repudiated by this Court in *Petterson v. Alaska SS. Co.*, 347 U. S. 396 (1954).

That such is not the case is evident from the opinion of the same Court of Appeals in *Feinman v. A. H. Bull SS. Co.*, 216 Fed. (2d) 393 (3d Cir. 1954), which recognized that a vessel could not escape liability for injuries consequent upon its unseaworthy condition upon the theory that such conditions were caused by other persons to whom control of the vessel was temporarily given. The argument of the petitioner that the opinion of the Court of Appeals was predicated upon the repudiated "control test" ignores the fundamental principle that any condition of a vessel does not amount to unseaworthiness.

It is, of course, true that the obligation of a vessel or its owner to provide a seaworthy craft is a non-delegable one and is a variety of liability without fault, *Seas Shipping v. Sieracki, supra*; *Mahnich v. Southern SS. Co.*, 321 U. S. 96 (1944). That principle, however, goes no further than to establish that a person in a status similar to that of a seaman may recover damages for injuries received as a consequence of the unseaworthiness of a vessel without establishing negligence or fault on the part of the craft or its owner. It does not result in the imposition of liability upon a vessel or its owner for injuries sustained by a person akin to a seaman simply because he is hurt aboard such vessel. Where equipment on a ship is reasonably fit for the purpose for which it is intended or is reasonably safe for the purpose for which it is to be used, the fact that the equipment is used in a negligent manner does not make the craft unseaworthy.

In *Manhat v. United States*, 220 Fed. (2d) 143, cert. den'd. 349 U. S. 966 (1955), the fact that a lifeboat which

was properly fitted with seaworthy releasing gear but which was not furnished with additional equipment which would prevent its fall if the gear were not properly used was not sufficient to impose liability upon the vessel for being unseaworthy.

Similarly, in *Freitas v. Pacific-Atlantic SS. Co.*, 218 Fed. (2d) 562 (1955) it was held that a longshoreman could not recover against a vessel for unseaworthiness where he was injured because of the failure of a winch operator to perceive that a shackle had caught against a strongback of a shelter deck hatch because of the failure of the longshoremen completely to uncover the hatches.

If the theory of the petitioner concerning unseaworthiness as asserted in the present petition is correct and the movement of the preventer and guys to the positions assumed by the trial court to have been admitted resulted in the application of extraordinary strain to the topping lift, the remarks of the court in the *Freitas* case, *supra*, in distinguishing the case of *Petterson v. Alaska SS. Co.*, *supra*, are particularly pertinent, for there it was said: [page 564 of 218 Fed. (2d)]

"The *Petterson* case is inapposite. Unlike the situation in *Petterson*, the accident in this instance was directly brought about by an improper, if not foolhardy, use of the ship's gear. * * *

To like effect^o is *Berti v. Compagnie de Navigation Cyprien Fabre*, 213 Fed. (2d) 397 (2d Cir. 1954) in which it was held that a plaintiff who was standing on a hatch cover and who was dumped into the hold below when a cable from the winches dislodged a supporting beam had not established that the vessel was unseaworthy.

Since there was no testimony introduced in the trial court that the fellow employees of the petitioner were

incompetent, the remarks of the Court in the *Berti* case, *supra*, are apposite. There it was said [at page 400 of 213 Fed. (2d)]

“ * * * Since there is no claim here that the long-shoremen were incompetent we think *Alaska SS. Co. v. Petterson*, *supra*, not pertinent. If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien.”

The case of *Grillea v. United States*, 232 Fed. (2d) 919 (2d Cir. 1956), relied upon by the petitioner, does not assert a different principal for the court there recognized the distinction implicit in the doctrine of liability for unseaworthiness that such condition does not result for transitory events and permitted recovery solely because a proper hatch cover which was placed over a wrong pad-eye became an integral part of the vessel and rendered it unseaworthy. See also: *Poignant v. United States*, 225 Fed. (2d) 595 (2d Cir. 1955).

While the salutary purpose of imposing upon the shipping industry the burden of responding in damages to persons injured by reason of the negligence or unseaworthiness of the vessel enunciated in *Seas Shipping v. Sieracki*, *supra*, is recognized, nevertheless, to impose liability upon a vessel upon a theory not advanced in the trial court and to subject the impleaded respondent which has already provided the petitioner with the medical care and benefits provided by the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 *et seq.* 44 Stat. 1424) to the hazard of responding in indemnity is not in accord either with established principles of law or of economic or social necessity. Such result creates a kind of unlimited recovery without fault in substitution for the predictable

liability without fault of an employer which is already available to the petitioner by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation Act. If such an extension of the doctrine of liability for an assumed unseaworthiness is to be for the first time adopted, it should not be adopted until there has been an opportunity to present testimony and have express findings of fact in the trial court in that respect.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MONIGAN, JR.,
Counsel for Impleaded Respondent,
Nacirema Operating Co., Inc.

LIBRARY

SUPREME COURT U. S.

Office-Supreme Court, U.S.

FILED

NOV 6 1958

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 61.

JOHN H. CRUMADY,

Petitioner,

v.

**"JOACHIM HENDRIK FISSER", her engines, tackle,
apparel, etc. and JOACHIM HENDRIK FISSER and/or
HENDRIK FISSER,**

Respondents.

BRIEF FOR THE RESPONDENTS

VICTOR S. CICHANOWICZ,

Counsel for Respondents,

26 Broadway,

Borough of Manhattan,

City of New York.

JOHN H. DOUGHERTY,

RENATO C. GIALLORENZI,

Of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Counterstatement of the Case	3
Summary of the Argument	14
THE ARGUMENT:	
I.—Since both Courts concurred that the proximate cause of the accident was the negligence of the longshoremen in the manner in which they were conducting the unloading operation, the Court of Appeals was correct as a matter of law in reversing the Trial Court	15
II.—The warranty of seaworthiness does not require that a vessel and its gear be fit for a purpose for which they are not intended or furnished. When so employed, there can be no liability for a breach of this warranty	19
III.—The Court of Appeals did not absolve the vessel on the relinquishment of control theory	27
IV.—Where the Trial Court makes findings which are inconsistent with each other and are not based on probative evidence and its conclusions resulting therefrom are contrary to law, the Court of Appeals may properly reverse the Trial Court and make new findings consistent with the probative facts and the law	30
CONCLUSION	38

CASES CITED

	PAGE
Aetna Ins. Co. v. Boon, 95 U. S. 117, 130	17
Alaska Packer's Association v. Industrial Accli. Com., 294 U. S. 532	26
Alaska S. S. Co. v. Petterson, 347 U. S. 396...	15, 16, 17, 27
Atchison, Topeka & Santa Fe Railway Company v. Calhoun, 213 U. S. 1, 7	17
Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 ..	15
Baltimore & P. S. B. Co. v. Norton, 284 U. S. 408, 414	26
Berti v. Compagnie de Navigation Cyprien Fabre, 2 Cir., 213 F. 2d 397	16, 18, 22, 23, 27
Bisso v. Inland Waterways Corp., 349 U. S. 85, 97 ..	27
Boudin v. Lykes Brothers Steamship Co., 348 U. S. 336	19
Coray v. Southern Pacific Co., 335 U. S. 520, 524 ..	16
Crowell v. Benson, 285 U. S. 22, 39-41	25
Cudahy Packing Co. v. Parramore, 236 U. S. 418 ..	25
De Zon v. American President Lines (1943), 318 U. S. 660, 672	26
Doucette v. Vincent, 1 Cir. (1952), 194 F. 2d 834 ..	22
Freitas v. Pacific-Atlantic Steamship Company, 9 Cir., 218 F. 2d 562, 564	16, 22

	PAGE
Galloway v. United States, 1943, 319 U. S. 372	34, 37
Grillea v. United States, 232 F. 2d 919	18
Grillo v. United States, 2 Cir., 177 F. 2d 904	16
International Stevedoring Co. v. Haverty, 272 U. S. 50	15, 25
John A. Roebling's Sons Co. v. Erickson, 2 Cir. (1919), 261 F. 986	23
Just v. Chambers, 271 U. S. 220, 227, 228	29
Kernan v. American Dredging Company, 355 U. S. 426	34
Lanasa Fruit SS & I. Co. v. Universal Ins. Co., 302 U. S. 556, 562	17
Magnum Co. v. Coty, 262 U. S. 159, 163	29
Manhat v. United States, 2 Cir. (1955), 220 F. 2d 143, cert. denied 349 U. S. 966	20, 21
Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356	26
Milwaukee etc. Railway Co. v. Kellogg, 94 U. S. 469	17
Nicholson v. Erie Railroad Company, 2 Cir. (1958), 253 F. 2d 939	16
Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128	25
Pacific S. S. Co. v. Peterson, 278 U. S. 130, 134 ..	23
Pennsylvania Railroad Company v. Pomeroy, 239 F. 2d 435, cert. denied 353 U. S. 950	16

	PAGE
Pope & Talbot v. Hawn, 346 U. S. 406	15
Reynolds v. Royal Mail Line, 9 Cir., 254 F. 2d 55..	16, 19
Seas Shipping Co. v. Sieracki, 328 U. S. 85....	15, 16, 17, 23
Slattery v. Marra Bros., 186 F. 2d 134, 136, cert. de- nied 341 U. S. 915	17
Standard Oil Co. v. United States, 340 U. S. 54, 58	17
Sturgis v. Clough, 68 U. S. 1 Wall 269	37
The Daisy, 9 Cir. (1910), 282 F. 261	18, 22, 23
The Santa Barbara, 2 Cir. (1920), 263 F. 369	23
The Santa Rita, 9 Cir. (1910), 176 F. 890, 895	17
The Silvia (1898), 171 U. S. 462	22

STATUTES CITED

Federal Employers' Liability Act, 45 U. S. C. 51 et seq.	16
Jones Act, 46 U. S. C. 688	16, 24, 25
Longshoremen's and Harbor Workers' Compensa- tion Act, 33 U. S. C. Sections 901, et seq.	25, 26

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 61

JOHN H. CRUMADY,

Petitioner,

v.

"JOACHIM HENDRIK FISSE", her engines, tackle, apparel,
etc. and JOACHIM HENDRIK FISSE and/or HENDRIK FISSE,
Respondents.

BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the District Court for the District of New Jersey is reported at 142 F. Supp. 389 (R. 14). The opinion of the Court of Appeals for the Third Circuit is recorded in 249 F. 2d 818 (R. 109). The opinion of the Court of Appeals on petition for rehearing is reported in 249 F. 2d 821 (R. 129).

Jurisdiction

The judgment of the Court of Appeals was entered on September 30, 1957 (R. 115). The order denying rehearing was entered on December 5, 1957 (R. 131). On Feb-

ruary 21, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to April 2, 1958. On February 27, 1958, by order of Mr. Justice Brennan, the time within which to file a petition for writ of certiorari was extended to May 2, 1958. The petition was filed on April 25, 1958, and it was granted on June 9, 1958. The jurisdiction of this court rests upon 28 U. S. C. Sec. 1254(1).

Questions Presented

1. When both courts below concur that the sole, active or primary or proximate cause of an accident to a longshoreman is the negligence of his fellow longshoreman, was the Court of Appeals correct in absolving the vessel of liability on the theory that a purported unseaworthy condition which the trial court held came into play by reason of such negligence was not the legal cause of the accident?

2. When an appliance on a vessel does not function as it is intended when the ship's gear is not employed for the purpose for which it is furnished, does it fail to meet the criterion of reasonable fitness which is prescribed by the doctrine of seaworthiness?

3. When an accident is caused by the negligence of a longshoreman's fellow employees, can the warranty of seaworthiness be extended so as to give the injured longshoreman a right to recover for a breach of warranty of seaworthiness although seamen traditionally had no such right and it would involve the circumvention of a statutory right?

4. When the conclusions of the trial court are inconsistent with its findings and the uncontroverted probative evidence and contrary to law, can the Court of Appeals properly reject the conclusions of the trial court?

Counterstatement of the Case

A counterstatement of the case is necessary because petitioner's statement makes it appear that his injuries were incurred as the result of a normal and proper unloading operation; whereas, in fact, both courts below found that this was not the case.¹ Petitioner also urges

¹ "Despite testimony to the contrary given by libellant and his fellow employees, I am persuaded by the clear weight of the evidence that either the taking of the slack or the taking of a strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than to slide) toward the off-shore edge of the under lip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping-lift of the boom such an excessive strain as to cause it to break and the boom to fall" (R. 30).

"I conclude as a matter of law that Nacirema's negligence was the sole, active or primary cause of the parting of the topping-lift and the fall of the boom, with its consequent injuries to the libellant, by reason of the negligent manner in which Nacirema through its employees, attempted to extract the timber from its obstructed position beneath the deck of the vessel" (R. 33).

"The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed" (R. 111).

"It was a proper finding that the negligence of the stevedores was 'the sole active or primary cause' of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema 'brought into play the unseaworthy condition of the vessel.' The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred" (R. 113-114).

that the excessive strain on the topping lift was produced by the position in which the longshoremen had reset the boom, whereas both courts below concurred that "the proximate cause" or the "sole, active or primary cause" of the overstrain on the ship's gear and the consequent breaking of the topping lift and the fall of the boom resulted in the negligent attempt of the longshoremen to extract a timber which they had caused to become jammed against the underedge of the hatch coaming *by continuing to apply power to the ship's winch AFTER* further movement of this timber had been effectively blocked.² Finally it is contended, even though the attempt by the longshoremen to extract the obstructed timber by continuing to apply the power to the ship's winch was the sole, active or primary cause of the accident, that an electromagnetic device (circuit breaker) which was set to operate in accordance with recommended practice and a Coast Guard regulation nevertheless rendered the vessel unseaworthy because the setting was not such as would have prevented the occurrence of the accident even though that was not the purpose of the circuit breaker, the longshoremen did not know of its existence and it was not the purpose for which it was intended or installed.

Thus, petitioner's statements and arguments are not reliable guides to the proceedings below because they do not set forth all the facts which are material to a proper consideration of this case, they omit and fail to give any consideration whatsoever to what both concurred was the sole or proximate cause of petitioner's accident and they seek to spell out a liability which, as a matter of law, does not exist on the basis of a purported failure of a ship's appliance to perform a function for which it was not intended, designed or furnished.

² Ibid.

There is no dispute that on January 2, 1954 the *SS Joachim Hendrik Fisser* arrived at Port Newark, New Jersey, with a cargo of lumber and timbers and that Nacirema Operating Company, the petitioner's employer, was engaged pursuant to a written contract to discharge this cargo from the *SS Joachim Hendrik Fisser* (R. 96-103). For the purpose of discharging the #1 hatch, the longshoremen were provided with two electric winches and two booms forward of #1 hatch as well as the customary appurtenances.

Each of the booms contained the customary marking at the heel thereof which, in accordance with international practice, was notice to the longshoremen that they were not to attempt to lift loads heavier than three tons with this gear of the ship (R. 44-45). These booms were supported by a wire rope called a topping lift in a double purchase arrangement which, according to the findings of the trial court (concurring in by the Court of Appeals), was adequate and proper for the loads for which the rest of the gear was designed and intended (R. 26) and had a safe working load of at least three tons (R. 25).

The power for each winch was supplied by an electric motor which had a rated capacity of 18 German horsepower. Transmission of power from the electric motor was controlled by a manual lever on the winch. When the winch operator pushed the lever away from himself, the winch would raise the draft. When the lever was pulled by the winch operator toward himself, the lifting operation would be reversed and the draft would be lowered. By placing the lever in a vertical position, the winch would stop turning (R. 27). In addition to this manual control, the winch was equipped with a switch by means of which the power to the winch could be shut off by the winch operator. The winch operator who had

operated the winch for an hour before the accident was shown this switch when he started to operate the winch and told what its function was (R. 29).

In order to protect each of the electric motors from burning out in the event excessive current should be built up and to act as a fuse and not a governor (R. 41-44), each of the motors was equipped with an electromagnetic instantaneous type of circuit breaker. The circuit breakers were located in a locker in the forepart of the mast house forward of the winches (R. 69-72). The winch operator did not know of their existence (R. 29) and had nothing to do with them insofar as operating the winch was concerned (R. 69-72). In order to overcome inertia, friction and the normal circumstances of operation when lifting a load (this is a fundamental law of physics), it was necessary to set the circuit breaker so that sufficient current could be generated to lift the load for which the lifting gear was designed. In view of this, according to our Coast Guard regulations* and based on accepted practice, it was proper to set such electromagnetic cut-off device so that the strain on the runner lifting the draft would be greater than the weight to be lifted (R. 45-46, 49-51, 90-91).

On the date of petitioner's accident, petitioner and his fellow workers came on board and discharged lumber and timber from the #1 hatch with the gear rigged in the manner the ship's crew had set it up. The discharging was done in the following fashion: The longshoremen first made up a draft of lumber or timber in the hatch and

* Coast Guard Regulation 46 C. F. R. Part 111.45-20(b2) allowed a setting up to 250% of full load current. 250% of full load current allows a load on the runner of $7\frac{1}{2}$ tons. The point at which the circuit breaker in question was set was equivalent to a full load current of a little over 6 tons, which was well within the maximum prescribed by the United States Coast Guard.

placed wire slings around it. They then hooked the two wire falls which were joined at the lifting end to the slings which were around the draft—one wire fall ran through a block which was at the head of the starboard (burton) boom which had been rigged over the deck and down through a block at the foot of the starboard (burton) boom and around the drum of the starboard winch, and the other passed through a block at the head of the port (up-and-down) boom which was over a point in the center line of the hatch square of #1 hatch, down through a block at the foot of the port (up-and-down) boom and around the drum of the port winch. By first applying the power to the port winch, the draft was raised upward and out of the hatch and then by applying the power of the starboard winch, the draft was transported across the deck of the vessel and lowered down onto the pier by reversing the raising operation and letting up on the runners. There was no claim or evidence in the case that the ship's winches could not be operated properly by means of the manual lever which was furnished for this purpose.

After working in this manner for approximately one hour and just immediately prior to the occurrence of petitioner's accident, the longshoremen, apparently in order to establish a more lateral pull for removing timber from under deck, switched the position of the port (up-and-down) boom so that the head of the boom was then above and perpendicular to a point on the vessel's deck two feet to the port of the port coaming of #1 hatch.

Immediately after the port (up-and-down) boom was moved into this position, the longshoremen attempted to lift two timbers, which measured from 8" x 8" to 12" x 12" in girth and from 30 to 37 feet in length, from the vicinity of the starboard side of the hatch. One of these timbers lay in the open square of the hatch just

outside the starboard hatch coaming. The other timber lay about two feet to the starboard main deck and just inside the lower projection of the starboard vertical coaming (on the inshore side).

The libelant and a fellow employee placed a double-eyed wire rope sling around these two timbers at a point some two or three feet from the after ends of these two timbers and the two eyes of the sling were then placed upon the cargo hook of the fall which extended from the head of the port (up-and-down) boom in a diagonal towards the starboard after end of the hatch where this sling around the timbers was located. As soon as this was done, libelant's co-worker gave two signals to the port (up-and-down) winchman. The first was to take up the slack on the fall. After that was done, a second signal was given to lift the timbers. According to the trial court it found that the following occurred:

" * * *, either the taking of the slack or the taking of the strain by the port winchman on the sling which was around the two timbers caused the inshore timber to turn or roll (rather than slide) toward the off shore edge of the underlip of the starboard coaming, or otherwise to become jammed or drawn against the coaming edge, thus effectively blocking the further movement of the timber, and that the continued application of power to the winch imposed upon the topping lift of the boom such an excessive strain as to cause it to break and the boom to fall" (R. 30).

Petitioner nonetheless sued the vessel *in rem* on the sole theory that his accident occurred because the topping lift cable was defective (R. 110-111). To that end petitioner produced numerous witnesses and exhibits. Amongst these exhibits were two pieces of obviously defective wire

rope (L. 10, L. 13) which were not of the same size as the topping lift wire with which the trial court found the vessel was equipped at the time (R. 38, 39) and which were identified by the vessel's Mate as being nothing more than pieces of the mooring line left over from mooring line repairs (R. 17-24). Further exhibits consisted of photographs purportedly taken of Exhibit L. 13 after it broke but before it was severed from the topping lift cable as it hung from the mast of the vessel. The witness who purportedly severed Exhibit L. 13 from the topping lift admitted that he had removed L. 13 from the vessel before photographs of it were taken (R. 17-24).

The trial court rejected libelant's evidence in toto and found that:

*" * * * the topping lift and its manner of rigging, which was in use just prior to the fall of the boom, was adequate and proper for the loads for which the rest of the gear was designed and intended"*
(R. 26) (Italics supplied).

Having eliminated the only basis of liability which petitioner sought to prove on the trial by having found that not only the topping lift but the manner of rigging in use just prior to the fall of the boom was adequate and proper for the loads for which the rest of the gear was designed and intended, and having concluded that the overstrain on the topping lift was produced by the continued application of power to the winch by the longshoremen after the timber had become jammed, the trial court "formulated a new theory of liability" and held the vessel liable on the ground that the negligence of the longshoremen in the manner in which they tried to force the blocked timber brought into play an unseaworthy condition of the vessel for which it believed the vessel was liable to peti-

tioner, for which liability, however, it was required to be indemnified by Nacirema Operating Company, the petitioner's employer.

Nacirema's obligation to indemnify was predicated on the theory that since its negligence in attempting to extract the timber from the obstructed position beneath the deck of the vessel was the sole, active or primary cause of the overstrain on the topping lift, Nacirema violated a duty which it owed to the vessel to exercise reasonable care in conducting the unloading operations and was, therefore, obliged to reimburse the vessel for any damages it was required to pay.

The liability of the vessel was predicated on the conclusion that the setting of the winch cut-off device at the time the winch was turned over to libelant and his fellow employees for operation rendered the vessel unseaworthy (R. 32). In arriving at this conclusion, the trial court did not indicate on what it based this conclusion. It pointed out that there was uncontradicted evidence that after the accident had occurred, inspection by the ship's Chief Officer disclosed that the cut-off had functioned and that the winch operated perfectly. It also noted that the cut-off device was susceptible of being so adjusted as to operate automatically at different degrees of excess load on the gear. It then further noted that apparently the cut-off device was set to function at a much lighter load than was imposed upon the gear although it was set to operate at a load slightly more than twice the safe working load of the topping lift (R. 31-32).

On appeal by all of the parties, the Court of Appeals reversed the trial court and dismissed the libel. Because of this disposition, the Court of Appeals did not consider the grounds urged by petitioner for reversal of the trial court nor those advanced by Nacirema Operating Company.

In its opinion, the Court of Appeals concurred with the trial court that the proximate cause or the sole, active or primary cause of petitioner's accident was the negligence of the longshoremen in the manner in which they attempted to use the ship's discharging gear after they had caused a timber to become obstructed against the under edge of the vessel's hatch coaming. It disagreed with the trial court that on the basis of the facts of this case there was any legal basis for holding the vessel liable to the petitioner. The Court of Appeals pointed out that in view of the fact that the cut-off device was set in accordance with the standard prescribed by the United States Coast Guard for the setting of such a control, and since the application of mathematics showed that subjecting a cargo runner whose safe working load was three tons to a strain of six tons did not in itself create any undue risk of breakage,⁴ there was no basis, in the absence of any showing that there was reason to fear that the gear would be subjected to a dangerous strain, to hold that the vessel's gear was unseaworthy or that it was the legal cause of the accident. The Court of Appeals accordingly absolved the vessel and reversed the trial court on the law because it found, as the trial court did, that the proximate cause of the accident was the negligence of the longshoremen, that the accident occurred while the longshoremen were using the ship's gear in a manner and for a purpose for which it was not furnished. While the Court of Appeals took note of the fact that by changing the position of the head of the boom the longshoremen made it possible for greater strain

⁴ The mathematical calculations are set forth in Exhibit IR-4 which was computed by the expert Stewart and Exhibits IR-5, IR-6 and IR-7 which were computed by the expert Simons. The laws of physics teach that inertia, friction and the normal circumstances of operation make it necessary that substantially more than a three-ton strain be imposed upon the gear before a three-ton load can be lifted.

to be translated to the topping lift rather than some other part of the gear, this nevertheless did not render the vessel unseaworthy in the absence of any indication that the longshoremen would subject the ship's gear to a strain greater than that presented by a normal lifting operation, which was presented by applying the power to the winch after the movement of the timber they were trying to discharge had become effectively blocked. In this connection, it said:

"The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. . . ." (R. 113-114).

Petitioner thereupon filed a petition for rehearing. On this application for the first time, petitioner contended that the shifting of the boom rendered the vessel unseaworthy and that that was the sole cause of the accident. He also advanced the new theory that the negligence of the longshoremen amounted to incompetence and that such incompetence also rendered the vessel unseaworthy.

Also, for the first time, although the trial of this action lasted from March 1 to April 12, 1956, petitioner attempted to challenge the Coast Guard regulation which governed the setting of such a cut-off device as was involved in this action. While it is contrary to the uncontroverted evidence in this case and has no support in the record, peti-

tioner, by means of incompetent and self-serving declarations in a footnote (R. 124), sought to destroy the existence, efficacy and application of this Coast Guard regulation to this case. This footnote in modified form appears at page 24 of petitioner's brief to this Court.

The Court of Appeals, however, declined to modify its previous holding based on a fundamental concept of law that the vessel could not be held for an accident which was proximately caused by the negligence of the longshoremen and denied a rehearing. In this connection, it stated:

"A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied."

Chief Judge Biggs who did not participate in the original appeal and who apparently relied on petitioner's revised account of what caused his accident filed a dissent in which he suggested a rehearing. It is apparent from the opinion of Judge Biggs that his version of the circumstances which gave rise to petitioner's accident was incomplete. It was based upon the assumption that when the injury occurred, the longshoremen were engaged in a normal unloading operation and that the proximate cause of the accident was not the negligent attempt of the longshoremen to extract a timber which they had caused to jam from its obstructed position but solely the incorrect positioning of the ship's boom.

Summary of the Argument.

a. While a vessel or its owner has a non-delegable duty to provide longshoremen with a seaworthy vessel and equipment, this warranty does not extend to accidents which are proximately caused by the negligent operation of seaworthy equipment by the fellow employees of the injured longshoreman. Nor does the concept of seaworthiness impose the requirement that the ship or its gear be fit for a purpose for which it is not furnished or that it take care of exigencies that are remote and unlikely. The criterion under the warranty of seaworthiness is reasonable fitness.

b. The traditional protection which has been afforded by the warranty of seaworthiness does not include and has never included the right to recover for the negligence of a fellow servant. It should not be used as an excuse to circumvent the legislative will which has given a remedy to longshoremen for injuries sustained under such circumstances.

c. Under the law, an appellate court may rightfully reject certain findings of the trial court when they are inconsistent with other findings of the trial court, are contrary to the uncontroverted probative evidence and are contrary to law. Mere speculation cannot be allowed to do duty for probative facts.

THE ARGUMENT

I

Since both Courts concurred that the proximate cause of the accident was the negligence of the longshoremen in the manner in which they were conducting the unloading operation, the Court of Appeals was correct as a matter of law in reversing the Trial Court.

The vessel has no quarrel with the decisions of this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot v. Hawn*, 346 U. S. 406; *Alaska S. S. Co. v. Petterson*, 347 U. S. 396; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52; *International Stevedoring Co. v. Haverty*, 272 U. S. 50, and the decisions of lower courts which are the necessary outgrowth of the principles laid down in these decisions. It does not dispute that where some defect in the vessel or its equipment is the proximate cause of an accident, a vessel or its owner would be liable under the law. It also does not dispute that when a longshoreman is injured while he and his co-workers are using ship's appliances for a purpose for which they are intended or furnished, a vessel or its owner would be held liable under the doctrine of seaworthiness. These principles were and are applicable to seamen and have been applied to longshoremen since the landmark decision by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85.

The vessel, however, disputes petitioner's contentions that the principles enunciated in those cases are applicable to him under the facts of this case or that it is a necessary corollary to those holdings that the protection afforded longshoremen under those decisions should be extended to petitioner.

It is a fundamental concept of law that before liability can attach, it is necessary that the act, omission or guilt of the party to be charged be the proximate cause of the injury. While it is true that in cases under the Federal Employers' Liability Act, 45 U. S. C. 51 et seq., and the Jones Act, 46 U. S. C. 688, liability can be found where the injury or death resulted "in whole or in part" from the negligence of a railroad worker's or the seaman's employer, this concept has no application in this case. *Pennsylvania Railroad Company v. Pomeroy*, 239 F. 2d 435, cert. denied 353 U. S. 950; *Nicholson v. Erie Railroad Company*, 2 Cir. (1958), 253 F. 2d 939. Those statutes specifically provide that liability flows where negligence is responsible "in whole or in part" for the casualty. *Coray v. Southern Pacific Co.*, 335 U. S. 520, 524. However, before a longshoreman or a seaman can recover for unseaworthiness, it must be proven that the unseaworthiness was the proximate cause of the accident. *Grillo v. United States*, 2 Cir., 177 F. 2d 904; *Freitas v. Pacific-Atlantic Steamship Company*, 9 Cir., 218 F. 2d 562, 564; *Reynolds v. Royal Mail Line*, 9 Cir., 254 F. 2d 55.

In holding that the negligence of the longshoremen which was the "proximate cause" or the "sole, active or primary cause" of the accident brought into play an unseaworthy condition for which the vessel would be liable to the petitioner under the principles enunciated in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Alaska S. S. Co. v. Petterson*, 347 U. S. 396; and *Berti v. Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, the trial court attempted to formulate a new theory of liability which is contrary to the doctrine of proximate cause.)

In defining proximate cause, this Court in *Standard Oil Co. v. United States*, 340 U. S. 54, 58, said:

"But the true meaning of that maxim is that it refers to that cause which is most nearly and essentially connected with the loss as its efficient cause."

In *Aetna Ins. Co. v. Boon*, 95 U. S. 117, 130, proximate cause was defined as follows:

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

In *Lanasa Fruit S. S. & I. Co. v. Universal Ins. Co.*, 302 U. S. 556, 562, this Court pointed out that in non-statutory cases, the doctrine of proximate cause does not vary. It stated:

"It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result."

To the same effect, see *Atchison, Topeka & Santa Fe Railway Company v. Calhoun*, 213 U. S. 1, 7; *Milwaukee etc. Railway Co. v. Kellogg*, 94 U. S. 469; *The Santa Rita*, 9 Cir. (1910), 176 F. 890, 895; *Slattery v. Marra Bros.*, 186 F. 2d 134, 136, cert. denied 341 U. S. 915.

In neither *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, nor in *Alaska S. S. Co. v. Petterson*, 347 U. S. 396, did this Court fashion a new rule of liability so that a vessel

or its owner would be liable if the proximate or the sole, active or primary cause of the accident was the negligence of the longshoremen in the manner in which they did their work. This contention was expressly rejected by the Court of Appeals in *Berti v. Compagnie de Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 401, when it said:

"As for the manner in which the work was performed, and any resulting transitory conditions . . . which may have been unsafe, American's (the stevedore) assumption of control relieved Cyprien (the shipowner) of responsibility."

The decision in *Grillea v. United States*, 232 F. 2d 919, permits of no exception in this case. In that case, even though the longshoremen had placed the hatch cover improperly, the Court held in effect that the proximate cause of the accident was not the act of placing the hatch cover in place but the unseaworthy condition which this improper placement had created. The Court's reference to the fact that there was a lapse of time between the placement and the occurrence of the accident and the fact that the misplaced hatch cover had become as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place, clearly distinguishes the subject case from that case. The accident occurred to *Grillia* as a result of a condition of the vessel, whereas petitioner's injury resulted directly from a foolhardy use of the ship's equipment by his fellow employees.

The holding of the Court in *The Daisy*, 9 Cir. (1910), 282 F. 261, is particularly applicable here. It said at page 262:

"For misuse the ship would not be liable. That the stevedore who held the hook was a fellow serv-

ant of libelant is also well established, and that the ship owner is not liable for the negligence of the fellow servant is equally well established."

Thus, in reversing the trial court, the Court of Appeals correctly held that the "gear was not proved to have been unseaworthy, neither was the setting of the cut-off device established as a legal cause of the accident which occurred."

II

The warranty of seaworthiness does not require that a vessel and its gear be fit for a purpose for which they are not intended or furnished. When so employed, there can be no liability for a breach of this warranty.

The duty of a shipowner to furnish a safe and seaworthy vessel and equipment does not mean that the vessel and its equipment must be fit to meet all contingencies and be safe in all respects regardless of the circumstances which may bring about the occurrence of an accident. The warranty of seaworthiness contemplates no more than that the vessel and its equipment be reasonably safe or fit when employed for the purpose for which they are intended or furnished. *Reynolds v. Royal Mail Lines*, 9 Cir. (1958), 254 F. 2d 55. This principle which forms the very core of the obligation of seaworthiness was reiterated by this Court in *Boudoin v. Lykes Brothers Steamship Co.*, 348 U. S. 336, when it said at page 339:

"The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that 'the vessel is reasonably fit to carry the cargo' . . ."

Despite the fact that when it concluded as a matter of law that Nacirema's negligence in the manner in which it attempted to extract the timber from its obstructed position beneath the deck of the vessel was the sole, active or primary cause of the parting of the topping lift, it was also necessarily the trial court's finding that the ship's gear at the time was not being used for the purpose for which it was furnished or intended and should have dismissed the libel.

This was the only conclusion which was permissible under the facts of this case. In *Manhat v. United States*, 2 Cir. (1955), 220 F. 2d 143, cert. denied 349 U. S. 966, after reviewing the authoritative holdings of this Court as well as decisions of the lower courts, the Court of Appeals rejected the contention that a releasing gear for a life boat should have been so foolproof that it would have prevented the occurrence of an accident when shore workers accidentally released it and caused injury to one of their fellow employees. There, as here, the accident was brought about by the unanticipated act of a fellow employee. In denying that the warranty of seaworthiness extended to include such a contingency, the Court said at page 148:

"The imposition of a requirement that a lifeboat be rigged to take care of exigencies as remote and unlikely as that which arose in this case would extend the scope of the warranty of seaworthiness beyond the limits set by the criterion of reasonable fitness."

The cases are legion that there is no basis for a finding of unseaworthiness when the ship's gear does not perform its intended function while it is being put to a use for which it is not intended. It would do violence to the

basic concept which gives rise to this warranty, i.e., that the equipment be reasonably fit for the use for which it was intended, to hold a vessel liable under such circumstances.

In *Manhat v. United States*, 2 Cir., 220 F. 2d 143, cert. denied 349 U. S. 966, an attempt was made to extend the warranty of seaworthiness to include the requirement that the vessel's gear be so foolproof that it would prevent the occurrence of an accident even when the equipment was not designed or furnished for such purpose. In rejecting this contention, the Court of Appeals said:

“ . . . Although the doctrine of seaworthiness which is said to impose a warranty on the shipowner that the ship, its equipment and appliances are not defective has, in recent years, been extended to include within the scope of the warranty such things as appliances brought on board by an independent contractor to be used by him in repairs aboard ship, *Alaska S. S. Co., Inc. v. Petterson*, supra, and the adequacy and competency of its crew, *Overseas Tankship Corp. v. Keen*, 2 Cir., 1952, 194 F. 2d 515, certiorari denied 1952, 343 U. S. 966, 72 S. Ct. 1061, 96 L. Ed. 1363, it has never been held to require the best possible equipment or to impose an insurer's liability for any and all injury to those working on shipboard, *Berti v. Compagnie De Navigation Cyprien Fabre*, 2 Cir., 1954, 213 F. 2d 397; see *Doucette v. Vincent*, 1 Cir., 1952, 194 F. 2d 834. As this Court held very recently, ‘(I)t requires only that equipment be reasonably fit for the use for which it was intended . . .’ *Berti v. Compagnie De Navigation Cyprien Fabre*, supra (213 F. 2d 400). In every case in which recovery for unseaworthiness has been al-

lowed, the trial court or the appellate court, in the exercise of its special admiralty power, found that either the ship or its appliances or equipment was not thus fit."

In *Berti v. Compagnie De Navigation Cyprien Fabre*, 2 Cir. (1954), 213 F. 2d 397, in defining the basic principles on which the warranty of seaworthiness is founded, the Court of Appeals said at page 400:

"But it has never been held that it requires the best possible equipment, see *Doucette v. Vincent*, 1 Cir., 194 F. 2d 834, or that the crew will be free from negligence. * * * It requires only that equipment be reasonably fit for the use for which it was intended, and that seamen be equal in seamanship to the ordinary men in the calling. * * * If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien." (Italics supplied.)

And in *The Daisy*, 9 Cir. (1922), 282 F. 261, the Court significantly stated at page 262:

"For misuse the ship would not be liable. That the stevedore who held the hook was a fellow servant of libellant is also well established, and that the ship owner is not liable for the negligence of the fellow servant is equally well established." (Citing cases.)

To the same effect is *The Silvia* (1898), 171 U. S. 462; *Doucette v. Vincent*, 1 Cir. (1952), 194 F. 2d 834; *Freitas v. Pacific-Atlantic Steamship Company, Inc.*, 9 Cir. (1955), 218 F. 2d 562.

It would also be repugnant to the basic principles underlying the warranty of seaworthiness to extend it to include accidents arising from the negligent acts of a longshoreman's fellow employees. *Berti v. Compagnie De Navigation Cyprien Fabre*, *supra*, 213 F. 2d 397, 400; *The Daisy*, *supra*, 282 F. 261-2. The failure by a seaman to use the ship's appliances properly was never a basis for liability under the general maritime law. *John A. Roebling's Sons Co. v. Erickson*, 2 Cir. (1919), 261 F. 986; *The Santa Barbara*, 2 Cir. (1920), 263 F. 369. To urge that a longshoreman should nonetheless be accorded such rights would be inconsistent with the principles under which this Court extended a seaman's traditional protection to a longshoreman. In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 99, 100, it was said that while the shipowner was at liberty to parcel out his work to shore labor, he, however, was not at liberty to discard his traditional responsibilities; and, therefore, a longshoreman, since he was incurring a seaman's hazards, should be entitled to the same protection a seaman enjoyed. The seaman's traditional and statutory protections, however, did not allow indemnity for injuries sustained through the negligence of the Master or any member of the crew. These traditional and statutory protections were summarized by this Court in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 134, as follows:

"By the general maritime law of the United States prior to the Merchant Marine Act, a vessel and her owner were liable, in case a seaman fell sick, or was wounded in the service of the ship, to the extent of his maintenance and cure, whether the injuries were received by negligence or accident, and to his wages, at least so long as the voyage was continued, and were liable to an indemnity for injuries received by a seaman in consequence of

the unseaworthiness of the ship and her appliances; but a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of the master or any member of the crew. The *Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 S. Ct. Rep. 483; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 380, 62 L. ed. 1171, 1175, 38 Sup. Ct. Rep. 501, 19 N. C. C. A. 309; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 258, 66 L. ed. 927, 929, 42 Sup. Ct. Rep. 475.

By § 33 of the Merchant Marine Act, as heretofore construed, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Employers Liability Act of [April 22], 1908 [35 Stat. at L. 65, chap. 149, U. S. C. title 45, § 51], and its amendments, and permitting these new substantive rights to be asserted and enforced in actions in personam against the employers in Federal or state courts administering common-law remedies, with the right of trial by jury, or in suits in admiralty in courts administering maritime remedies, without trial by jury. *Panama R. Co. v. Johnson*, 264 U. S. 375, 68 L. ed. 748, 44 Sup. Ct. Rep. 391; *Engel v. Davenport*, 271 U. S. 33, 70 L. ed. 813, 46 Sup. Ct. Rep. 410; *Panama R. Co. v. Vasquez*, 271 U. S. 557, 70 L. ed. 1085, 46 Sup. Ct. Rep. 596; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. ed. 1069, 47 Sup. Ct. Rep. 600." (Italics supplied.)

Thus, not until 1920 were seamen permitted to sue the shipowner for negligence and this only by reason of an Act of Congress (46 U. S. C. 688). The right to sue for negligence of a fellow employee, as the petitioner attempts here, was never a part of a seaman's traditional

protection. Insofar as longshoremen are concerned, they can have no greater right than seamen had and they are precluded by statute from suing for negligence of a fellow employee. For a time, longshoremen were permitted to sue their employer for negligence in not providing safe working conditions. In 1926, this Court extended to longshoremen the additional benefits of the Jones Act, among which was the right to sue for negligence of a fellow seaman. *International Stevedoring Co. v. Haverty*, 272 U. S. 50. Thereafter, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sections 901 *et seq.* The longshoremen accepted this workmen's compensation act which afforded them a remedy on the basis of liability without fault in lieu, among other things, of the right to sue for the negligence of their fellow servants. Seamen, however, preferred to remain outside and take the risks of the Jones Act (46 U. S. C. 688), *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, and that still remains the basis of their actions for negligence of a fellow servant.

To urge, as petitioner does at page 9 of his brief, that if the warranty of seaworthiness is not extended to include the negligence of longshoremen, an injured longshoreman may be left without relief, may be misleading. He always can have the protection of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., § 901 *et seq.*). It cannot be disputed that Congress has the right to alter or revise the maritime law and relegate a worker to the remedies of the Compensation Act. *Crowell v. Benson*, 285 U. S. 22, 39-41. In fact, it was the purpose of Congress in enacting this compensation law to provide the longshoremen with a right to recovery for liability without fault similar in respect to that which was accorded seamen under the general maritime law. *Crowell v. Benson*, 285 U. S. 22, 41; *Cudahy Packing Co.*

v. *Parramore*, 263 U. S. 418. Significantly, the Compensation Act was also designed to distribute the loss among the industry which is served by the longshoremen. *Alaska Packer's Association v. Industrial Acci. Com.*, 294 U. S. 532; *Baltimore & P. S. B. Co. v. Norton*, 284 U. S. 408, 414.

What petitioner's contention, therefore, really amounts to is a belated plea on his behalf that this Court circumvent the Longshoremen's and Harbor Workers' Compensation Act and provide him with a remedy which he considers (33 U. S. C. 901 *et seq.*) more favorable than that which Congress enacted. On several occasions, this Court has expressed its disapproval of efforts to circumvent legislative enactments because they may not be as desirable as other remedies appear to be. In *De Zon v. American President Lines* (1943), 318 U. S. 660, 672, it pointed out that it was not for this Court to say whether the legislative policy was wise or not, nor was it this Court's function to circumvent the legislative will and create a theory of liability which would permit the petitioner to by-pass the rights which the legislature deemed fit to fix. This is all the more true when the legislation was affected with a public interest.⁴ In such an instant, this Court remained firm in its position that it had to be adhered to even though it might work a hardship in some cases. *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U. S. 356.

To saddle the vessel with the responsibility for the negligence of petitioner's fellow employees would also be a most unrealistic approach to the problem of accident prevention as well as the principles on which liability under our law is predicated. The responsibility for an accident

⁴ The Compensation Act is a statute affected with a public interest. *Baltimore & P. Steamboat Co. v. Norton*, 284 U. S. 408, 414.

should rest with those who have the power to prevent it. To do otherwise begets recklessness, carelessness and neglect. Cf. *Bisso v. Inland Waterways Corp.*, 349 U. S. 85, 97.

The Court of Appeals committed no error in reversing the trial court. It did nothing more than correct the misapprehension under which the trial court was laboring, i.e., that the warranty of seaworthiness required not only that the vessel and its equipment be reasonably safe for their intended purpose but that they also be capable of withstanding all hazards, no matter what their source might be.

III

The Court of Appeals did not absolve the vessel on the relinquishment of control theory.

Despite petitioner's protestations to the contrary, the Court of Appeals did not absolve the vessel under the so-called "control" doctrine which was repudiated by this Court in *Petterson v. Alaska S. S. Co.*, 347 U. S. 396. It did no more than place the finding of the trial court, with which it concurred, that the "proximate cause" or the "sole, active or primary cause" of the parting of the topping lift was the negligent manner in which the longshoremen attempted to extract the timber from beneath the deck of the vessel in its proper perspective. If it dealt with any type of control, it was only that measure of control which petitioner concedes (p. 13 of his brief) Nacirema did possess in the sense that its employees were handling the unloading gear at the time of the accident. It is such control, according to the Court of Appeals in *Berti v. Compagnie De Navigation Cyprien Fabre*, 2 Cir., 213 F. 2d 397, 400, 401, that relieves the shipowner of

responsibility. In this connection, it pointed out at page 400:

"As we said in *Gallagher v. United States Lines Co.*, 2 Cir., 206 F. 2d 177, 179, certiorari denied 346 U. S. 897, 74 S. Ct. 221, 'a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work.' * * * And had there been, the question would properly have been one for the jury. We are clear that since control of the details of the operation was left to American, Cyprien cannot be held for negligence in the latter's performance."

Certainly, even in its extremest form, a shipowner's control could not embrace the acts of the longshoremen in their operation of the ship's equipment. In stating that there was "nothing in the record which suggests that such an eventuality was reasonably to be feared or anticipated" (R-114), the Court of Appeals made it clear that it was not relying on the "repudiated control concept." It was merely taking the correct approach, that seaworthiness could not possibly contemplate any liability where there was no reason to fear that the ship's gear would be used in such a manner that it would be subjected to a stress or strain which a normal operation would not entail. This lack of fear necessarily existed because there was no reason to expect that the longshoremen would be so foolhardy as to try to extract a timber after they had caused it to become jammed by continuing to apply power to the winch and was buttressed by the presumption that in doing their work the longshoremen would do it in a proper and safe manner. Certainly, it was not unreasonable to

expect that in discharging the cargo, the longshoremen would not cause a timber to become jammed and that when movement of the timber had become effectively blocked, they would continue to apply the power to the winch until something broke. It was reasonable to assume that when this occurred, the winch operator would stop the winch either by putting the control lever in neutral or turning the switch which had been shown to him when he started to work on board the vessel.

Petitioner's reference to decisions of this Court as well as those of some lower courts where longshoremen have been injured because of defects in the ship or its gear furnishes no authority for the allowance of a recovery here. In each instance, the proximate or primary cause of the accident was such defect in the vessel or its equipment. In each instance, too, the accident occurred while the vessel or its equipment were being used for the purpose for which they were furnished and intended. In each instance, it was found that they failed to measure up to the prescribed standard. None of these circumstances, however, fits the subject case.

Under the facts of this case, those decisions cannot be related to the occurrence in question, unless the fundamental fact that the overstrain on the topping lift was caused by the continued application by the longshoremen of power to the ship's winch after the timber became jammed be omitted. This cannot be done here because it would require the substitution of new findings for those which were made by the Courts below. *Just v. Chambers*, 271 U. S. 220, 227, 228. Nor is it the function of this Court to give petitioner a new trial. *Magnum Co. v. Coty*, 262 U. S. 159, 163.

IV

Where the Trial Court makes findings which are inconsistent with each other and are not based on probative evidence and its conclusions resulting therefrom are contrary to law, the Court of Appeals may properly reverse the Trial Court and make new findings consistent with the probative facts and the law.

In requesting a reversal of the Court of Appeals, petitioner states that he is not seeking a review on the ground that the Court of Appeals "chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all the evidence in the record." In effect, petitioner concedes that if there is any evidence to support the finding of the Court of Appeals, his entire point should fail.

In this connection, much is attempted to be made of the fact that after the Court of Appeals stated that *hoisting gear of the kind in suit is rated to lift a load not more than one-fifth of the strength of the cable itself*, it further added that *"gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons."* Does petitioner mean by this that if the Court of Appeals had said that gear rated to handle a three ton load utilizes cable adequate to withstand a strain of less than 15 tons, i.e., 14 tons, 10 tons, etc., its reasoning would have been correct? All that the Court of Appeals was saying here was that since the cable was adequate to withstand more than six tons, it was not improper. It did in effect so state when it said that *"subjecting the cargo runner to a strain of six tons did not in itself create any undue risk*

of breakage." It is evident that a strain of six tons on a cable having a breaking point of fifteen tons creates no undue risk of breakage. The difference between safe working load and the breaking load is a cushion or a safety tolerance. It does not mean that the gear will start breaking when the safe working load is exceeded. It is only when the strain approaches the breaking point that distortion in the wire begins to take place and is, in turn, followed by damage to the component wires of the rope. A wire rope unlike twine or wood is actually a machine having many moving parts. Each time the rope bends or straightens, the wires in the strands slide on each other and only when the breaking point is reached that they begin to deteriorate. In disputing the reference of the Court of Appeals to cable adequate to withstand a strain of fifteen tons, petitioner overlooks the vital fact that the breaking strain or tensile strength of the wire rope which was used in the topping lift was computed at 19,600 pounds. Since the topping lift was in a double purchase arrangement, it would be stronger by about 50% (R-24-25). This would give it a breaking strength of more than fifteen tons.

Nowhere in the record or in any of the findings of the trial court does it appear that the breaking strength of the topping lift was fifteen tons. The fact that the trial court found that the topping lift parted under a strain of between 17 and 21 tons further amply demonstrates the fallacy of petitioner's contention that the Court of Appeals committed reversible error when it made reference to "fifteen tons."

While it is true that the expert Stewart and the witness Byrne both testified that the safe working load of wire rope is one-fifth of its tensile strength, both were in

agreement that the load which was suddenly applied to the topping lift by the manner in which the winch driver operated the winch amounted to at least 42,300 pounds (R-30, 48). Thus, it cannot be inferred from the testimony of either of these witnesses that the breaking or tensile strength of the topping lift in question was fifteen tons even though they testified that the safe working load of wire rope is one-fifth of its breaking load. Even the expert Simons found the breaking load to be greater than fifteen tons, i.e., 17 tons (R-30-31).

These are the real facts which gave rise to the mathematical formula of the Court of Appeals, as it was expounded by the experts Stewart and Simons (IR 4-IR 7). The record amply demonstrates its validity and accuracy. The level of the breaking point clearly was not used as the safe capacity of the gear. Petitioner's entire argument arises from the erroneous assumption that the breaking load must always be equivalent to five times the designated safe working load, no matter what its breaking load may be computed to be. It is evident that safe working load does not always mean that a force of five times the safe working load of gear will necessarily cause such gear to break. Nor does it mean that a strain in excess of the safe working load constitutes a danger. Safe working load is merely a limitation on the recommended load to which a unit of the gear should be subjected so that there may be a maximum safety tolerance or cushion (R-87-89). Since the trial court found that the topping lift was adequate and proper for the loads for which the rest of the gear was designed and intended, the only conclusion that was possible here was that in setting the circuit breaker on the electric motor of the winch to cut off at six tons, no undue risk of breakage was created.

On the other hand, even if petitioner's line of reasoning should be adopted, the facts nonetheless support the position taken by the Court of Appeals. The trial court noted that inspection by the ship's Chief Officer after the accident occurred showed that the cut-off device had functioned. If, as petitioner contends, the breaking strain is five times the safe working load, it leads to only one conclusion and that is that when the strain on the winch reached 6 tons and the cut-off functioned, the strain on the topping lift was built up to 30 tons when the topping lift broke. No other conclusion is possible because if the topping lift broke before the cut-off device functioned, then the strain on the winch would have been relieved and the point at which the cut-off device was set to function would not have been reached. Conversely, if the cut-off functioned before the topping lift broke, then it would have prevented any further strain from building up on the topping lift. Thus, no matter how the Court of Appeals chose to describe the situation which was created, it is evident that the topping lift broke because of the unanticipated and unreasonable strain which the longshoremen imposed on the ship's gear by negligently applying power to the ship's winch after the movement of the timber was effectively blocked. Since both the winch stopped and the topping lift broke, the conclusion is inescapable that this could not have occurred unless both were subjected to a strain of 30 tons. Such a strain certainly could not be reasonably expected or anticipated from a normal lifting of a 3-ton draft. The setting of the cut-off device, therefore, could not be improper.

The Court of Appeals furthermore was required to reverse the trial court because of the Court Guard regula-

tion⁵ and the uncontroverted evidence that the vessel had followed standard procedure. This Court has held that a non-compliance with such a regulation is a basis for liability. *Kernan v. American Dredging Company*, 355 U. S. 426, would seem to be a necessary corollary that compliance therewith should be sufficient to absolve from liability. The trial court certainly had no right to let speculation do duty for probative facts. *Galloway v. United States*, 1943, 319 U. S. 372.

⁵ TABLE 111.45-20 (b2).—Maximum rating or setting of motor branch circuit protective devices for motors not marked with a code letter indicating locked rotor KVA.

Type of motor ³	Percent of full-load-current ^{1 2}		
	Fuse rating	Circuit breaker setting Instantaneous type	Time limit type
Single-phase, all types	300	...	250
Squirrel cage and synchronous (full-voltage resistor and reactor starting)	300	...	250
Squirrel cage and synchronous (auto-transformer starting):			
Not more than 30 amperes	250	...	200
More than 30 amperes	200	...	200
High-reactance squirrel cage:			
Not more than 30 amperes	250	...	250
More than 30 amperes	200	...	200
Wound rotor	150	...	150
Direct current:			
Not more than 50 horsepower	150	250	150
More than 50 horsepower	150	175	150

¹ For certain exceptions to the values specified see paragraphs 111.45-5(c), 111.45-20(b), and 111.45-20(g).

² Synchronous motors of the low-torque low-speed type (usually 450 r. p. m. or lower) such as are used to drive reciprocating compressors, pumps, etc., which start up unloaded, do not require a fuse rating or circuit breaker setting in excess of 200 percent of full-load current.

³ For motors marked with a code letter, see table 111.45-20(b1).

Petitioner's assertion that this regulation does not refer to winches expressly or impliedly is contrary to the uncontroverted testimony of two experts who testified in this matter as well as to the regulation itself. In this connection, the expert Simons stated:

"The Court: Then there is no fixed design of the cut-off mechanism of an electric winch aboard ship which precludes its setting at a variety of cut-off stages, is there?

The Witness: Well, the Maritime Commission has certain maximum amounts of current that they specify you cannot exceed. You cannot exceed a certain current in the setting. Outside of that I myself know of no special setting except what is considered good practice in the field.

.

The Court: Now, what is the name of the regulation to which you say prescribes the quantity of current at which the winch, the maximum quantity of the current, the minimum quantity of current at which the winch will cut off?

The Witness: I do not know the exact name of the regulation. It is a Maritime Commission regulation or administration, as it is now called. I know something about what the regulation states, that it will allow a maximum of three times the normal load current to run through the cut-off before it cuts off but no more. In other words, a cut-off cannot be set on any ship that comes under the Maritime Administration, so that the setting will allow over three times the normal load current to pass through the circuit breaker.

.

Q. Is there any—apart from any government regulation—any prescribed standard of design which can be expressed in a percentage of the capacity which the winch is designed to lift for the functioning of the automatic cut-off device of an electric winch? A. I don't know" (R-45-46).

.

"Q. You have testified that the Maritime Administration has regulations which provide that the cut-off be set at three times the normal load, isn't that correct—for normal load current? A. Yes, that is maximum, by the way.

Q. You cannot go beyond that? A. No" (R-47).

.

"Q. Mr. Foley, are you familiar with electric winches that have an electro magnetic overload relay? A. An electric magnetically actuated, yes. They are instantaneous type relays.

The Court: What do you mean by instantaneous type?

The Witness: When the current reaches the setting they go out. A thermo type is usually known as an inverse time limit relay.

The Court: So that by reason of the distinction you get an instantaneous shut-off when the electro magnetic field has been created.

The Witness: To the setting of the relay.

.

The Court: Objection sustained. Do you know what the maritime regulations are respecting this question?

The Witness: I do.

Q. What are they?

• • • • •

The Witness: For direct current motors under 50 horsepower, 250 per cent of full load current. If it is an instantaneous type relay, if it's a time limit relay it is 150 per cent.

The Court: Say that again slowly. 250 per cent—

The Witness: Of the full load current of the motor when the relay is an instantaneous type relay.

The Court: And this was an instantaneous type we are talking about?

The Witness: That is correct.

The Court: In other words, it takes 250 per cent of the safe load.

The Witness: Of the full load current of the motor.

The Court: Before it shuts off.

The Witness: Before it trips, yes, and there are reasons for that. (R-49-50).

• • • • •

The only matter in the record which might be considered as contrary to this Coast Guard regulation and the testimony of these experts was an opinion by the witness Byrne who was not offered as an electrical engineer and was not familiar with the mechanics or electronics of a cut-off device (R-95). His opinion, therefore, had no probative value. *Galloway v. United States* (1943), 319 U. S. 372; *Sturgis v. Clough*, 68 U. S. 1 Wall 269.

Petitioner's self-serving statement that this regulation does not refer to ship's winches expressly or impliedly

but has to do with current supplied to lights and water coolers, etc., not involving any strain on gear as is involved in the operation of a ship's winch, is not only misleading but is contradicted by the regulation itself. Footnote 2 under this regulation specifically excludes the type of appliances which petitioner says are included. It would seem incongruous for this regulation to refer to motors of up to 50 horsepower and over if it was dealing with motors which related only to lights, water coolers, etc. Unimportant as it may seem, it should also be noted that petitioner seeks also to make a distinction by asserting that this regulation does not refer to winches. It does refer to electric motors on ships and it was an electric motor which powered the winch in this case as it does in all instances.

Petitioner's contention that the Court of Appeals reasoned contrary to the evidence is accordingly incorrect and should therefore be rejected in toto.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Counsel For Respondents,
 26 Broadway,
 Borough of Manhattan,
 City of New York.

JOHN H. DOUGHERTY,
 RENATO C. GIALLORENZI,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.

FILED

NOV 6 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

No. 61.

JOHN H. CRUMADY,

Petitioner,

vs.

**JOACHIM HENDRIK FISSER, her engines, tackle, apparel,
etc., JOACHIM HENDRIK FISSER, and/or
HENDRIK FISSER.**

No. 62.

**JOACHIM HENDRIK FISSER, her engines, tackle, apparel,
etc., JOACHIM HENDRIK FISSER, and/or
HENDRIK FISSER,**

Petitioner,

vs.

NACIREMA OPERATING CO., INC.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT.**

BRIEF FOR IMPEADED RESPONDENT.

JOHN J. MONIGAN, JR.,

Counsel for Impeaded Respondent

Nacirema Operating Co.,

744 Broad Street,

Newark 2, New Jersey.

HOWARD G. WACHENFELD,

On the brief.

INDEX.

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT:	
UNDER THE CIRCUMSTANCES IN THE PRESENT CASE, THERE IS NO BASIS EITHER IN THE FACTS OR IN SUBSTANTIVE LAW FOR AN AWARD OF INDEMNITY AGAINST THE IMPEADED RESPONDENT.....	9
(a) Indemnity can be awarded only if there is a contract, express or implied, between the parties	10
(b) Indemnity can not be justified upon the theory that the vessel is a third-party beneficiary of the stevedoring contract.....	17
(c) The principle of avoiding circuity of action affords no support for the allowance of indemnity in the present case.....	20
(d) If it should be determined that the vessel was unseaworthy because of the com- bination of gear with a safe working load of three tons with a winch which did not cease operation until the application of six tons, to permit recovery would permit the vessel to avoid liability occasioned by its own fault.....	22
CONCLUSION.....	25

TABLE OF CASES.

	PAGE
<i>Amador v. The Ronda et als.</i> , 146 Fed. Supp. 617, (S. D. N. Y.).....	23
<i>American District Telegraph Co. v. Kittleson</i> , 179 Fed. (2d) 946, (8th Cir.).....	16
<i>American Mut. Liability Ins. Co. v. Matthews</i> , 87 Fed. Supp. 854 (E. D. N. Y.), reversed 182 Fed. (2d) 322	13, 22
<i>American President Lines v. Marine Terminals Corp.</i> , 234 Fed. (2d) 753 (9th Cir.), cert. den'd 352 U. S. 926.....	13
<i>Autobuses Modernos, SA v. The Federal Mariner</i> , 125 Fed. Supp. 780 (E. D. Pa.).....	23
<i>Baltimore Transit Co. v. State</i> , 183 Md. 674, 39 A. 2d 858	16
<i>Bankers Indemnity Ins. Co. v. Cleveland H & F Co.</i> , 77 Ohio App. 121, 62 N. E. 2d 180.....	16
<i>Frugh v. Rogers</i> , 24 Cal. 2d 200, 148 P. 2d 633, 152 A. L. R. 1043.....	16
<i>Bordal v. Atlantic Maritime Co., Inc., et als.</i> , 127 F. Supp. 186, (E. D. Pa.).....	13
<i>Brown v. American Hawaiian S. S. Co. et al.</i> , 211 Fed. (2d) 16, 18 (3d Cir.).....	13, 14
<i>Burns v. Carolina Power & Light Co.</i> , 88 Fed. Supp. 769 (E. D. S. C.).....	16
<i>Calvery v. Peak Drilling Co.</i> , 118 Fed. Supp. 335 (W. D. Okla.).....	16
<i>Compania Anonima Venezolana v. Cottman Com- pany</i> , 145 Fed. Supp. 761 (D. C. Md.).....	23
<i>Crawford v. Pope & Talbot, Inc.</i> , 206 Fed. (2d) 784, (3d Cir.)	13
<i>Feinman v. A. H. Bull S. S. Co.</i> , 216 Fed. (2d) 393 (3d Cir.)	11
<i>Hagans v. Farrell Lines</i> , 237 Fed. (2d) 477 (3d Cir.)	15, 23

<i>Halcyon Lines v. Haena Ship, etc. Corp.</i> , 342 U. S. 282	11
<i>Hansucker v. High Point Bending & Chair Co. et al.</i> , 237 N. C. 559, 75 S. E. 2d 768	16
<i>Hill Lines, Inc. v. Pittsburgh Plate Glass Company</i> , 222 Fed. (2d) 854 (10th Cir.)	16
<i>The Hindustan</i> , 37 Fed. (2d) 932, aff'd. memo 44 Fed. (2d) 1015, (CCA 2d)	11
<i>Inhabitants of Lowell v. Boston and Lowell R. R. Corp.</i> , 23 Pick (Mass.) 24	6, 7, 12, 13
<i>Isbrandtsen Co. v. Local 1291 etc.</i> , 204 Fed. (2d) 495 (3d Cir.)	20
<i>LoBue v. U. S.</i> , 188 Fed. (2d) 800 (2d Cir.)	13
<i>Long v. Silver Line</i> , 48 Fed. (2d) 15 (C. C. A. 2d)	11
<i>Lunderberg v. Bierman</i> , 241 Minn. 349, 63 N. W. 2d 355	16
<i>McAllister v. U. S.</i> , 348 U. S. 19	10
<i>Peak Drilling Co. v. Halliburton Oil Well Cement Co.</i> , 215 Fed. (2d) 368 (10th Cir.)	16
<i>Petterson v. Alaska S. S. Co.</i> , 205 Fed. (2d) 478 (9th Cir.), aff'd. memo 347 U. S. 396	11
<i>Public Service Electric and Gas Co. v. Waldroup</i> , 38 N. J. Super. 419, 119 A. 2d 172 (App. Div.)	16
<i>Read v. United States</i> , 201 Fed. (2d) 758 (3d Cir.)	13
<i>Riddle & Co. v. Mandeville and Jemesson</i> , 9 U. S. (5 Cr.), 322	21
<i>Robbins Dry Dock & Repair Co. v. Flint</i> , 275 U. S. 303	8, 19
<i>Ryan Co. v. Pan-Atlantic Corp.</i> , 350 U. S. 124	7, 11, 13, 15, 22
<i>Slattery v. Mara</i> , 186 Fed. (2d) 134 (2d Cir.), certiorari den'd. 341 U. S. 915	13
<i>Standard Wholesale Phos. & A. Wks. v. Rukert Term. Corp.</i> , 193 Md. 20, 65 A. 2d 304	16
<i>States S. S. Co. v. Rothschild International Stevedoring Co.</i> , 205 Fed. (2d) 253 (9th Cir.)	13

<i>Torres v. The Kastor</i> , 227 Fed. (2d) 664 (2d Cir.).....	23
<i>Union Stockyards Co. v. Chicago etc. R. R. Co.</i> , 196 U. S. 217	12
<i>United States v. Rothschild International Stevedor- ing Co.</i> , 183 Fed. (2d) 181 (9th Cir.).....	13
<i>Ward v. Denver & R. G. W. R. Co.</i> , 119 Fed. Supp. 112 (D. Colo.).....	16
<i>Washington Gas Co. v. District of Columbia</i> , 161 U. S. 316.....	12
<i>Westchester Lighting Co. v. Westchester County Small Estates Corporation</i> , 278 N. Y. 175, 15 N. E. 2d 567	16
<i>Westfall v. Lorenzo Gin Company</i> , Tex. Civ. App. , 287 S. W. 2d 551 (not officially reported)	16
<i>Westfield v. Mayo</i> , 122 Mass. 100.....	12

TABLE OF STATUTES.

33 U. S. C. A. §901 <i>et seq.</i> , 44 Stat. 1424.....	15
---	----

TABLE OF OTHER AUTHORITIES.

19 Am. Jur. 96, Equity §83.....	21
70 Harv. L. Rev. 149 (1956).....	13
103 U. of Pa. L. Rev. 321 (1954).....	13
Restatement of Contracts §133.....	19
Senate Report 973, 69th Cong., 1st Sess. 16 (1926).....	15
2 Williston on Contracts, §356A (Rev. Ed.).....	19

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 61.

JOHN H. CRUMADY,

Petitioner,

vs.

*Joachim Hendrik Fisser, her engines, tackle, apparel, etc.,
Joachim Hendrik Fisser, and/or Hendrik Fisser.*

No. 62.

*Joachim Hendrik Fisser, her engines, tackle, apparel, etc.,
Joachim Hendrik Fisser, and/or Hendrik Fisser,*
Petitioner,

vs.

NACIREMA OPERATING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR IMPEADED RESPONDENT.

Questions Presented.

1. Can a theory of unseaworthiness, first asserted on a petition for a rehearing in the Court of Appeals, which was predicated upon a mistaken interpretation of the trial court as to the absence of a conflict in the testimony concerning such theory afford the basis for a recovery without

a remand and a proper finding of fact resolving such controversy?

2. Is not the absence of a contract between a putative indemnitor and indemnitee fatal to the claim of indemnity where the parties are not mutually obligated to the injured person and the putative indemnitor is the employer of the injured person whose claim for damages is the basis for the assertion of the right to indemnity?

3. Even if the absence of such a contract is not fatal to the claim of indemnity, can one successfully assert such right to indemnity when his own fault contributed to the injuries against which indemnity is sought?

Statement of the Case.

The present action was instituted by a libel *in rem* as a result of which a stipulation for value was filed and the vessel was released from the custody of the marshal (R. 1). The libel sought to recover damages consequent upon injuries sustained by the libellant while aboard the vessel *Joachim Hendrik Fisser* which was alongside a bulkhead at Port Newark, New Jersey, on the navigable waters of the United States. The libellant contended that the injuries which he sustained occurred by reason of the falling of a boom at the No. 1 hatch during the course of his work as a longshoreman discharging a cargo of lumber from the vessel (R. 14).

It was contended by the libellant that the boom which was caused to fall fell because the topping lift, to the knowledge of the vessel's owner, was "worn, frayed and damaged" and that "the equipment attached to . . . the boom . . . was insufficient, defective and unsuited to handle

the transfer of the said cargo" (R. 16). The respondent and claimant asserted a claim for indemnification under the 56th Admiralty Rule against the impleaded respondent upon the vessel's contention that the "sole cause of the breaking of the topping lift, and the consequent falling of the boom, was the active negligence or improper conduct of the libellant's fellow employees in the handling of the cargo and unloading gear" (R. 16). It was not disputed that the libellant was in fact injured while engaged in the employ of the impleaded respondent as a longshoreman; that after the unloading operation of the craft had continued for approximately one hour the port boom fell into the No. 1 hatch.

At the trial, the testimony offered by the libellant was directed to two theories upon which a determination that the vessel was unseaworthy could be predicated. One was that Exhibits L-10 and L-13, which were conceded by all witnesses to be in such condition as to render their use as a topping lift unsuitable and dangerous (R. 17n), were, in fact, parts of the topping lift to which the port boom was attached on the day of the accident. The other theory of liability for unseaworthiness asserted by the libellant in the trial court was predicated upon the stipulation of the parties that the vessel provided an electric winch which was equipped with a device which interrupted its operation upon the application of a burden exceeding 100% of its capacity. Because of the fact that the gear and booms had a safe working load of 3 tons and the winch, which was the source of the power applied to such gear, had a capacity before the operation of the cutoff device of more than 6 tons, the theory was projected and accepted by the court that the vessel was unseaworthy because of this improper combination of gear (R. 32).

The respondent sought to escape liability for the alleged unseaworthiness of the vessel upon the theory that certain of the ship's tackle and gear were moved to an unseaworthy

position which was testified to by one of the ship's officers but which was sharply contradicted by the testimony presented on behalf of the impleaded respondent, (R. 52-57) and, in addition, contended that there was a jamming of two timbers under the coaming of the No. 1 hatch, as a result of which an undue strain was placed upon the topping lift.

The trial court, after evaluating the conflicting testimony concerning the topping lift (R. 17-24n), concluded that the wire submitted in evidence by the vessel and not Exhibits L-10 and L-13 was in fact the topping lift which parted on the day of the accident (R. 26) but accepted the alternate theory advanced by the libellant that the cutoff device by which the operation of the winch was automatically interrupted on the application of a burden exceeding the capacity of the winch (R. 16) combined with gear which could safely bear only one-half of such capacity rendered the respondent vessel unseaworthy (R. 32).

The trial court, in its opinion, recognized the conflicting testimony as to the alleged jamming of the timbers (R. 30) but ignored the conflict in the testimony as to the movement of the gear, stating that it appeared "without contradiction" that the gear was moved to a position (R. 29) which imposed an excessive burden upon the topping lift, as a consequence of which the injuries resulted from the active negligence of the impleaded respondent (R. 33) so to entitle the respondent to full indemnity against it (R. 35).

From the judgment thereupon rendered, all of the parties appealed to the Court of Appeals. The impleaded respondent alleged that the decision of the District Court was erroneous because of its failure to appraise the credibility of the conflicting testimony concerning the movement of the guy and preventer which was the subject of considerable testimony by the witness Manuel Costa who testified in detail as to the location of the guy and preventer

when the longshoremen first came aboard the craft on the day of the accident and the positions to which they were moved under his direction (R. 57-58) and that the position to which he moved the guy and preventer was the best position in order to work the gear on the ship, based upon his experience (R. 58). Since the decision of the Court of Appeals resulted in its determination to reverse the finding of the District Court that the vessel was unseaworthy by reason of the winch cutoff device, the absence of an evaluation of the conflict in the testimony in respect of the positions to which the preventer and guy were moved by the employees of the impleaded respondent became immaterial, as did the correctness of the decision of the trial court with respect to the allowance of full indemnity against the impleaded respondent.

Not until the petition for rehearing in the United States Court of Appeals was the contention asserted by the libellant concerning the imposition of liability upon the vessel by the alleged improper movement of the preventer and guy. The impleaded respondent contends in those circumstances, particularly in the light of the failure of the trial court to appraise the conflict in the testimony concerning the vital question of whether or not the vessel was unseaworthy because of the movement of the guy and the preventer so to impose an excessive strain on the topping lift or because certain timbers were jammed under the coaming of the hatch in which the libellant was injured or a combination of those events, that it is essential that the trial court make a definitive appraisal of the testimony offered on behalf of the several parties in that respect. It further contends that if this court does resolve the question of unseaworthiness in favor of the libellant, the vessel, nevertheless, can not successfully cast the impleaded respondent in damages for full indemnity because the impleaded respondent and

the vessel were not under a mutuality of obligation to the libellant and there was no contract between the impleaded respondent and the vessel, the only contract being between the impleaded respondent and Insular Navigation Company (R. 26-103), which admittedly was the agent of the charterer of the vessel (R. 107).

Summary of Argument.

If this Court in case No. 61 accepts the contention of the libellant asserted for the first time in his petition for rehearing in the Court of Appeals that the vessel is unseaworthy because of the movement of the guy and preventer to an unseaworthy position⁹ by the employees of the impleaded respondent, the interest of justice requires a remand for a finding of fact upon that question, since the trial court failed to observe the conflict in the testimony offered by the vessel and by the impleaded respondent as to the position to which such gear was moved, merely observing that the testimony in that respect was uncontradicted (R. 29). Regardless, however, of the disposition of the question of the unseaworthiness of the vessel, its claim against the impleaded respondent in indemnity as a matter of law and fact is not sustainable in the present action.

Implicit in the doctrine of indemnity is that a cause of action therefor must stem from a contract, either express or implied. A contract to indemnify is implied in law only where two persons are under a legal obligation to a third person who has been injured. In such circumstances, the one who is cast in damages to the injured person without actual culpability but because of a non-delegable legally imposed duty is entitled to indemnity from one whose negligent conduct caused the injury, *Inhabitants of Lowell v.*

Boston and Lowell R. R. Corp., 23 Pick (Mass.) 24. Since the libellant is an employee of the impleaded respondent, the only obligation it owes to him for the injuries sustained is that imposed by the Longshoremen's and Harbor Workers' Compensation Act. As a consequence, there is no mutuality of obligation between the respondent impleaded and the vessel to respond to the libellant in damages. The vessel's obligation, if it is not grounded upon negligence, must be predicated upon the unseaworthy character of the craft. The impleaded respondent owes no duty to its employee either in negligence or for unseaworthiness of the vessel upon which the employee works. Moreover, any obligation imposed upon the impleaded respondent by reason of an injury sustained by its employee is expressly prohibited by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act unless there is a contract within the holding of this Court in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124.

Admittedly, the only contract to which the impleaded respondent was a party was a simple stevedoring contract without an express provision for indemnity which was made between it and an agent of Insular Navigation Company which was the agent of the charterer of the vessel. While the *Ryan* case determined that the immunity conferred upon a stevedore employer by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act did not prevent its voluntary acceptance of an additional obligation by contract, that case does not support the imposition of liability upon a stevedoring employer for indemnity asserted by a vessel with whom it had no contractual relationship.

The mere existence of a charter-party has been held insufficient by this court to constitute the charterer a third-party beneficiary of a contract to repair the vessel made

between its owner and a dry dock company so to permit the charterer to recover for the loss of the benefits of the charter during the making of repairs to a propeller which was damaged by the negligence of the dry dock company, *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303.

The obligation owed by the charterer to the owner of the vessel cannot be resolved in this court since the charterer is not a party to the present action and the charter-party is not before the court. There is no basis upon which a determination can be made that the charterer would be liable to the vessel or its owner since neither the law applicable to the charter-party nor the tribunal which may be called upon to resolve such controversy is known to this court, and hence, the assumed cause of action based upon the equitable principle of avoiding circuity of action is not available to support the allowance of indemnity. Whether a charterer is obliged under substantive law to discharge maritime liens against the vessel during the period of the charter affords no ground for the allowance of indemnity in the present case, since no lien either maritime or otherwise arising out of the present action is asserted by the libellant, since while a monition *in rem* originally issued, a stipulation for value resulted in the discharge of the lien and the release of the craft (R. 1).

Even if the absence of a contract is not regarded as fatal to the claim of the vessel to indemnity, its improper combination of a winch with the capacity of six tons as an integral part of gear capable of sustaining a burden of only three tons prevents the allowance of indemnity in the absence of a specific undertaking to that effect since that result would permit the vessel to be indemnified against its own fault.

ARGUMENT.

Under the circumstances in the present case, there is no basis either in the facts or in substantive law for an award of indemnity against the impleaded respondent.

The only direct concern of the impleaded respondent in the controversy in case No. 61 stems from the right to indemnity which is asserted in the cross petition based upon the assumption that the result reached in the United States Court of Appeals for the Third Circuit will be altered by this court. The only observation which appears necessary to make in that respect is that the theory of unseaworthiness now asserted by the libellant concerning the responsibility of the vessel resulting from the assumed movement of the gear which it is contended resulted in an excessive burden upon the topping lift causing it to part was not asserted by the libellant in the trial court and was first incorporated in its petition for rehearing after the adverse determination of the Court of Appeals. Because of the failure of the trial court to appraise the conflicting testimony offered on behalf of the vessel and on behalf of the impleaded respondent concerning the position to which the guy and preventer were moved, if such movement is to be the basis upon which the claim of unseaworthiness is to be resolved and possibly subject the impleaded respondent to ultimate liability to the vessel, such result should not be accomplished without a remand to the trial court to resolve the conflict in the testimony and to make findings of fact thereon.

There is no more reason in the factual testimony presented to assume that the topping lift parted by reason of an excessive strain placed upon the topping lift by

reason of an assumed location of the preventer which would render it useless (R. 58) than to conclude that it parted either because the timbers were jammed or because the vessel improperly integrated a winch with a capacity of 6 tons with gear which could bear safely only 3 tons. While the conclusion reached by the trial court concerning the unseaworthy character of the vessel by reason of the cut-off device on the winch was supported by testimony which under the decision of this court in *McAllister v. United States*, 348 U. S. 19 will not be altered upon appeal unless it is clearly erroneous, its finding that there was an absence of a conflict in the testimony concerning the location of the preventer and guy is clearly erroneous and if the former conclusion of the trial court is reversed, the latter conclusion can not be supported in the present state of the record without further factual findings which would review and resolve the conflicting testimony in that respect.

(a) Indemnity can be awarded only if there is a contract, express or implied, between the parties.

It is admitted that the only contract involved in the present case was a simple stevedoring agreement which did not contain an express provision for indemnity. It was made between the impleaded respondent and the Insular Navigation Company on December 30, 1953 (R. 96). That contract was offered in evidence at the trial of the matter but was excluded upon timely objection by the impleaded respondent (R. 108). It was conceded by counsel for the vessel upon the trial of the action that Insular Navigation was acting as agent for the charterer in executing the contract (R. 107). In those circumstances and because the libellant is an employee of the impleaded respondent, there is no legal basis for the imposition of liability in favor of the vessel, for to do so violates the immunity afforded by

the Congress to the impleaded respondent in respect of liability for injuries sustained by its employees in circumstances where such employer has not voluntarily by contract consented to such imposition of an additional liability in favor of the putative indemnitee and there is no legal relationship between the parties which gives rise to indemnity as a matter of law. The contention of the vessel in the present case, in which the United States as *amicus curiae* joins, would extend the liability first accepted by the majority of this court (with four Justices dissenting) in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 to permit a vessel which has not contracted with a stevedore company to extend the obligation of such company to discharge the liability of the vessel which has been imposed against it by reason of its obligation to provide a seaworthy craft. In that respect it is the ultimate extension of the devices used by vessels to escape liability predicated upon the doctrine of unseaworthiness.¹

The doctrine of indemnity, in the absence of an express contract, had its origin in what was said to be a common-law principle stemming from implied contracts. In circumstances where two persons were under a legal obligation

¹ At one time by reason of the so-called "control test", a vessel was able to escape liability to a person injured if its unseaworthiness resulted from the fault of persons other than the vessel or its crew, particularly when the damage resulted from the improper use of equipment which was not under its control, *The Hindustan*, 37 Fed. (2d) 932, *aff'd*, memo 44 Fed. (2d) 1015 (CCA 2d); *Long v. Silver Line*, 48 Fed. (2d) 15 (CCA 2d). That doctrine, however, was determined to be erroneous in *Petterson v. Alaska S. S. Co.*; 205 Fed. (2d) 478 (9th Cir.), *aff'd*, memo 347 U. S. 396, and no longer can be used to exculpate the ship, *Feinman v. A. H. Bull S. S. Co.*, 216 Fed. (2d) 393 (3d Cir.).

To accomplish a similar result, the admiralty doctrine of contribution in collision cases was used to limit the pecuniary responsibility of the vessel, but that device was held to be inapplicable to non-collision cases; and hence, contribution was not permitted where both the vessel and others were guilty of negligence, *Halcyon Lines v. Haenn Ship, etc. Corp.*, 342 U. S. 282.

to a third person, the one who was held liable to the injured person without actual culpability but because of a breach of a non-delegable legally imposed duty was held to be entitled to indemnity from one whose conduct caused the injury. Typical of such cases is the situation in which a statutory obligation is imposed upon a municipality in the maintenance of highways. When such municipality is liable in damages to a person injured in consequence of the defective condition of such highway, which condition was caused by the negligence of a person hired by the municipality to perform work thereon, a municipality, nevertheless, is permitted to recover from such negligent person that which it has been obliged to pay to him who was hurt. Such was the decision in the early case of the *Inhabitants of Lowell v. The Boston and Lowell R. R. Corp.*, 23 Pick. (Mass.) 24.

The principle thus established was considered an exception to the general rule that there could be no contribution between participants in a criminal action or between joint tortfeasors. To permit recovery, the existence of liability to the person injured and the imposition of damages upon one who was guilty of no active misfeasance but whose obligation to the injured party was imposed by operation of law without moral fault were required, *Westfield v. Mayo*, 122 Mass. 100. However, if the party who sought indemnity was guilty of a breach of duty in its own right to the injured person, implied indemnity is not permitted; and the general rule which precludes contribution between joint tortfeasors is applicable, *Union Stockyards Co. v. Chicago etc. R. R. Co.*, 196 U. S. 217. Cf. *Washington Gas Co. v. District of Columbia*, 161 U. S. 316.

In the absence of a contractual undertaking, it appears manifest that there can be no indemnity awarded against an employer in consequence of injuries sustained by its employee when such employee is covered by the Longshore-

men's and Harbor Workers' Compensation Act, for unless circumstances exist which afford a basis for the application of the common-law doctrine of indemnity exemplified by the foregoing decision of the *Inhabitants of Lowell v. Boston and Lowell R. R. Corp.*, *supra*, there is no substantive right of action therefor.²

The doctrine that a contractual or other special relationship between the parties was not essential to indemnity, represented by the decisions of *U. S. v. Rothschild International Stevedoring Co.*, 183 Fed. (2d) 181 (9th Cir.) and *States S.S. Co. v. Rothschild International Stevedoring Co.*, 205 Fed. (2d) 253 (9th Cir.), which was at one time apparently accepted in the Ninth Circuit before the decision in *Ryan Co. v. Pan-Atlantic Corp.*, *supra*, appears to have been repudiated by the decision in that Court of *American President Lines v. Marine Terminals Corp.*, 234 Fed. (2) 753 (9th Cir.), cert. den'd. 352 U. S. 926; and the concurring opinion in *States S.S. Co. v. Rothschild International etc.*, *supra*, which recognized the necessity for a contractual or special relationship upon which the indemnity can be grounded, is now accepted in that circuit.

The applicable principles were well stated in *Crawford v. Pope & Talbot, Inc.*, 206 Fed. (2d) 784 (3d Cir.), where it was said at page 792:

" . . . Section 5, [33 U. S. C. A. §905], however, does not insulate the employer from all liability to a third party from whom an employee has recovered

² This principle was recognized in the cases of *Slattery v. Marra*, 186 Fed. (2d) 134 (2d Cir.), certiorari den'd. 341 U. S. 915, and *Brown v. American-Hawaiian S. S. Co. et al.*, 211 Fed. (2d) 16, 18 (3d Cir.). To like effect see: *Lo Bue v. U. S.*, 188 Fed. (2d) 800 (2d Cir.); *American Mutual v. Matthews*, 182 Fed. (2d) 322 (2d Cir.); *Read v. United States*, 201 Fed. (2d) 758 (3d Cir.); *Crawford v. Pope & Talbot, Inc.*, 206 Fed. (2d) 784 (3d Cir.); *Bordal v. Atlantic Maritime Co., Inc. et als.*, 127 F. Supp. 186 (E. D. Pa.). See also: 103 U. of Pa. L. Rev. 321 (1954); 70 Harv. L. Rev. 149 (1956).

damages. See *United States v. Arrow Stevedoring Co.*, 9 Cir., 1949, 175 F. 2d 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity arising out of such contractual relations have not been considered barred by the section. See *Rich v. United States*, 2 Cir., 1949, 177 F. 2d 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. * * * (Brackets ours.)

To like effect is the opinion in *Brown v. American-Hawaiian SS. Co.*, *supra*, at page 18 [of 211 Fed. (2d)]

* * * There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employee for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the *Crawford* case: there can be no action of indemnity in these cases which is not based on the violation of

some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 412, 74 S. Ct. 202. • • •

Those decisions were cited with approval in *Hagans v. Farrell Lines*, 237 Fed. (2d) 477 (3d Cir.).

Nor does the majority opinion in *Ryan v. Pan-Atlantic Corp.*, *supra*, afford any support for the contention that in the absence of a contract between the parties indemnity can be allowed against an employer who is subject to the liabilities imposed by the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 *et seq.* as amended, 33 U. S. C. §901 *et seq.*). That the Congress in adopting the Longshoremen's and Harbor Workers' Compensation Act contemplated thereby to abolish any other liability to its employees other than that created by the Act is evident.³ While the *Ryan* case must be regarded as establishing the principle that the immunity conferred upon employers subject to the Act would not prevent the voluntary creation of an additional right by contract, such result in the absence of an express undertaking in the said

³ In Senate Report 973, 69th Cong., 1st Sess. 16 (1926) the following comment appears:

"Sections (4), (5), and (6) of the bill contain the appropriate provisions for making certain that the compensation will be paid, *abolishing liability* on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins." (Emphasis supplied.)

contract to benefit others than those who are parties thereto would seem to impose upon a covered employer a liability "on account of an employee's injury" within the prohibition of Sec. 5 of the Act.⁴ Not only does the express limitation of an employer's liability to his employee which is prescribed by the Longshoremen's and Harbor Workers' Compensation Act prevent indemnity because of such express limitation but it also precludes the assertion of an obligation for indemnity based upon the principle of

⁴ While the decisions under State Workmen's Compensation Acts are not uniform, the overwhelming majority (9—2) of the decisions appear to exclude liability of an employer in an action asserted against it by one cast in damages for injuries sustained by an employee in the absence of a contract between the parties. See: (Maryland) *Baltimore Transit Co. v. State*, 183 Md. 674, 39 A. 2d 858; (Ohio) *Bankers Indemnity Ins. Co. v. Cleveland H & F Co.*, 77 Ohio App. 121, 62 N. E. 2d 180; (South Carolina) *Burns v. Carolina Power & Light Co.*, 88 Fed. Supp. 769 (EDSC); (New Mexico) *Hill Lines, Inc. v. Pittsburgh Plate Glass Company*, 222 Fed. (2d) 854 (10th Cir.); (North Carolina) *Hansucker v. High Point Bending & Chair Co. et al.*, 237 N. C. 559, 75 S. E. 2d 768; (Oklahoma) *Peak Drilling Co. v. Halliburton Oil Well Cement Co.*, 215 Fed. (2d) 368 (10th Cir.); (New Jersey) *Public Service Electric and Gas Co. v. Waldroup*, 38 N. J. Super. 419, 119 A. 2d 172 (App. Div.); (Colorado) *Ward v. Denver & R. G. W. R. Co.*, 119 Fed. Supp. 112 (D. Colo.); (Texas) *Westfall v. Lorenzo Gin Company*, Tex. Civ. App., 287 S. W. 2d 551 (not officially reported); *contra* (New York) *Westchester Lighting Co. v. Westchester County Small Estates Corporation*, 278 N. Y. 175, 15 N. E. 2d 567; (Minnesota) *Lunderberg v. Bierman*, 241 Minn. 349, 63 N. W. 2d 355. It also strongly appears that California would follow the majority rule. *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P. 2d 633, 152 A. L. R. 1043. The case of *American District Telegraph Co. v. Kittleson*, 179 Fed. (2d) 946 (8th Cir.) has been cited as following the minority view, but it has been correctly observed that in that case there actually was a contract between the parties. See: *Calvery v. Peak Drilling Co.*, 118 Fed. Supp. 335, 339 (W. D. Okla.). The Longshoremen's and Harbor Workers' Compensation Act has also been interpreted to exclude such liability on the part of the employer. *Standard Wholesale Phos. & A. Wks. v. Rukert Term. Corp.*, 193 Md. 20, 65 A. 2d 304. It is interesting to note that all these cases holding the employer's compensation payments to exclude all other liability were decided after the *Westchester* case, *supra*, in which there was a vigorous dissent by Chief Judge Crane.

implied contract, for by definition an employer owes no duty to his employee in negligence, and accordingly, an evaluation of active and passive negligence which was referred to by the trial court (R. 33) is inapposite since if there is no duty to respond in negligence there can be no breach of that duty which requires a relative evaluation thereof.

(b) Indemnity can not be justified upon the theory that the vessel is a third-party beneficiary of the stevedoring contract.

Both the vessel and the *amicus curiae* seek to justify indemnity in the present action upon the theory that the vessel is a third-party beneficiary of the stevedoring contract. The vessel seeks to ground its contention that it occupied the position of such beneficiary because the contract, itself, referred to the vessel by name, and consequently, it is said a duty to it arose therefrom.⁵ Neither the vessel nor the *amicus curiae* points to any testimony which would support the contention of either as to the intended beneficiary of the contract, and it would seem evident from the admitted nature of the relationship between the contracting parties, namely, one being a stevedore and the other an agent of the charterer, that there is no compelling reason to conclude that it was the intention of the charterer to benefit anyone other than itself in entering into the

⁵ Why the mere identification of a place at which work should be performed should have that effect is not disclosed by the vessel. The significance which the *amicus curiae* professes to find in the answer of the impleaded respondent to Article Eleventh of the libel is equally obscure. Since the stevedoring contract was signed by J. J. Smith on behalf of Insular Navigation Company (R. 103), which admittedly was the agent of the charterer of the vessel (R. 107), and not by any employee or agent of the owner, the employer of the master and crew of the vessel manifestly has no significance in the resolution of the intended beneficiary of that agreement.

agreement. Presumably, mercantile considerations which suggested the commercial prudence of entering into the charter-party motivated the contract between the charterer and the stevedoring company. There would seem to be no more reason to regard the vessel as being the beneficiary of the stevedoring contract in the absence of an express provision to that effect than there would be to assume that the charterer entered into a charter-party to benefit the owner rather than to create a profit thereby for the charterer. Nor can the document, itself, be said to suggest any intention of the parties to benefit any persons other than those who were parties to the undertaking. Had it been the intention of the charterer to confer a benefit upon the vessel by reason of its contract, it would have been a simple matter so to provide. If the vessel wished to be the beneficiary of a stevedoring contract, it could have made its designation as a beneficiary of such agreement a condition of the charter-party. Had that course been followed in the present case, the question of the intention of the parties to benefit the vessel would squarely have been presented and the impleaded respondent would have had an opportunity either to refuse to perform the work, being exposed to such greater liability than that to which it would normally be exposed, or, it could agree to do so upon an appropriate increase in its rates therefor. To suggest that the contract between the impleaded respondent and the agent of the charterer should be treated as if such provisions were contained in that agreement and in the charter-party has not the support of any substantive law or any considerations of economic or social policy.⁴ That a third-party benefi-

⁴ Neither the vessel nor the *amicus curiae* have pointed to any economic or social considerations which would make vessels as a class less able than stevedoring contractors to bear economically the losses sustained by persons injured thereon because of the unseaworthy condition of the craft.

ciary of a contract must establish more than a simple desire to profit by agreements entered into by others would seem to be an essential limitation of the doctrine which has been present since its inception.

The principle is well stated in 2 *Williston on Contracts*, §356A (Rev. Ed.):

“••• It is commonly said that such a beneficiary must be a third person whom the contracting parties ‘intend’ shall receive a ‘direct benefit’ from the promise.”

See also: *Restatement of Contracts* §133.

Factually similar to the present case and directly contrary to the contention that the relationship between an owner and charterer itself is sufficient to predicate a third-party beneficiary relationship is the decision of *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303. There the time charterers of a steamship sought to recover from a dry dock company damages for loss of use of the steamer upon which work was being performed by the dry dock company in accordance with a contract which that company made with the owner of the vessel. Pursuant to that contract, the vessel was docked and its propeller was damaged by reason of the negligence of the dry dock company, causing the vessel to remain out of service, to the damage of the charterers. Mr. Justice Holmes, speaking for the court, denied the charterers' claim that they were third-party beneficiaries of the contract even though the charter-party provided for repair of the vessel every six months, saying:

“••• But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract ‘or in any respect beneficiaries’ and were not entitled to sue

for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit.' (Citations omitted)''

Similarly in *Isbrandtsen Co. v. Local 1291 etc.*, 204 Fed. (2d) 495 (3 Cir.) it was held that a time charterer of a vessel was not such a beneficiary of a stevedoring contract made between a stevedoring company and a voyage charterer of the same vessel, even though the voyage charterer by reason of the charter-party was to load and unload the vessel, so to permit the time charterer to recover damages for failure of the stevedoring company to unload the vessel in accordance with its agreement.

(c) The principle of avoiding circuitry of action affords no support for the allowance of indemnity in the present case.

It is contended by the *amicus curiae* that to permit recovery in indemnity would avoid circuitry of action. Such argument quite obviously is without merit in the instant case for there is no way to resolve the question of whether the charterer would be liable to the vessel if the vessel is liable in damages to the libellant in the present action. The charterer is not a party to the present action, and the charter-party is not before the court. The law governing the performance of the charter-party and the rights and liability of the parties thereto are likewise matters which can not be resolved, for there is a complete absence of any proof in the record concerning them. While the equitable principle founded upon the avoidance of multiplicity of suits is a recognized ground for relief, it is manifest

that before the doctrine is called into operation as a matter of fact or substantive law there must be a foundation for the assertion of the right for the enforcement of which judicial action is invited. The principle is stated in 19 *Am. Jur.* 96, *Equity* §83 as follows:

"The prevention of circuitry of action is a recognized ground of equitable jurisdiction. The chancery court will settle in one suit the diverse rights and obligations of persons who are successively liable and will impose liability on the one who is ultimately liable at law."

An early example of its correct application is found in *Riddle & Co. v. Mandeville and Jemesson*, 9 U. S. (5 Cr.) 322, in which a holder of a promissory note was permitted to maintain an action against a remote endorser thereof.

Whatever may be the obligation of a charterer to the owner of a vessel in respect of the discharge of maritime liens either by terms of the charter-party, itself, or by reason of general maritime law can not be utilized as the basis for the assumption that the vessel in the present case could maintain an action in some court upon some theory of law, for in fact there currently is no maritime lien against the *Joachim Hendrik Fisser*. As has been observed earlier, a stipulation for value has been filed, and the vessel was released (R. 1). To assume without any proof that a cause of action exists in such circumstances as between the vessel and its charterer or the latter's agent, Insular Navigation Company, where neither the theory of the cause of action nor the identity of the nation in whose tribunals such right might ultimately be asserted is indeed a fragile foundation upon which to project a cause of action upon the equitable theory of avoiding circuitry of actions.

(d) If it should be determined that the vessel was unseaworthy because of the combination of gear with a safe working load of three tons with a winch which did not cease operation until the application of six tons, to permit recovery would permit the vessel to avoid liability occasioned by its own fault.

▼ If the absence of a contract between the claimant and the respondent impleaded does not prevent indemnity as a matter of law, if the vessel were unseaworthy because of the combination of the winch with gear which safely could be operated at only one-half the capacity of the winch, it is manifest that the vessel thus seeks indemnity against the results of its own culpable act and in such situations even if there is a contract between the putative indemnitor and indemnitee recovery is not permitted in the absence of a definitive expression of such intention by the parties. In the instant case, there was a complete absence of testimony that the stevedores were aware of the fact that the automatic cutoff device was not designed to operate until a burden in excess of twice the safe working load of the gear would be applied. Because of the absence of such knowledge, the usual circumstances in which a vessel has been permitted to obtain indemnity against the stevedore employer exemplified by the decisions in *Ryan Stevedoring Company v. Pan-Atlantic SS Corp.*, *supra*, are not present. As was said by Judge Swan in *American Mut. Liability Ins. Co. v. Matthews*, 182 Fed. (2d) 322, (2d Cir.) at page 324:

“ . . . In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect

any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution. * * *

A similar result was reached in *Hagans v. Farrell Lines*, *supra*, where it was held that when a vessel was guilty of negligence in providing a defective winch it could not escape liability for its own fault since its liability to the injured person was not based solely upon the improper conduct of fellow employees of the person injured. See also: *Torres v. The Kastor*, 227 Fed. (2d) 664, (2d Cir.); *Autobuses Modernos, SA v. The Federal Mariner*, 125 Fed. Supp. 780 (ED Pa.).

Since the right to indemnity depends upon the terms of the contract between the vessel and the indemnitor, several decisions have even refused to permit recovery upon a written agreement in circumstances similar to the instant case. In *Compania Anonima Venezolana v. Cottman Company*, 145 Fed. Supp. 761, (D. C. Md.), the court refused to construe a written contract of indemnity to impose an obligation to indemnify the owner of the vessel when the contract to indemnify was made with a charterer.

In *Amador v. The Ronda et als.*, 146 Fed. Supp. 617, (S. D. N. Y.) a vessel was held not to be entitled to indemnity where it had improperly stowed cargo which was unloaded by the respondent impleaded and caused injury to one of the latter's employees. The court said at page 620:

" * * * * * In short, the stowage was improper, should the strips be discharged over the tops of the

coils * * *.' The strips were discharged over the tops of the coils, and in these circumstances, ' * * * the way they were discharged was as much a part of the stowage, as is the proximity of perishable cargo to cargo that will injure it.' 224 F. 2d 437, 440. Accordingly, the stowage was characterized as dangerous. And as the Court of Appeals also pointed out, ' * * * the situation is to be distinguished from one in which the longshoremen were merely negligent in discharging a well stowed cargo.' If the stevedore is to be held liable on an implied obligation, that obligation must have included moving the coils out from under the square of the hatch before the strips were discharged, or discharging the coils and then reloading them after the strips were discharged. Such an implication would impose an obligation on the stevedore to supply the condition that would render the stowage proper; that is, the stevedore would by implication be held responsible for saving the shipowner from negligence in providing an unseaworthy ship * * *."

Since the stevedores in the present case used a winch which was provided by the vessel without knowing of its inherent defect in relation to the remaining gear which was attached to it, even an express contract of indemnity would not be construed to absolve the vessel of the consequences of its own fault unless such intention was expressly set forth in the instrument itself. In the instant case since there is no contractual relationship between the vessel and the respondent-impleaded, to imply any such undertaking is manifestly lacking in any basis, either factual or legal.

Conclusion.

For the reasons herein expressed and without regard to the disposition of case No. 61, the claim of the cross-petitioner for indemnity should be denied.

Respectfully submitted,

JOHN J. MONIGAN, JR.,
Counsel for Impleaded Respondent,
Nacirema Operating Co., Inc.

HOWARD G. WACHENFELD,

On the brief.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.

FILED

MAY 1 1958

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~9-1~~ 62

JOACHIM HENDRIK FISSE, Her Engines, Tackle,
Apparel, etc., *Petitioner,*

AGAINST

NACIREMA OPERATING CO., INC., *Respondent.*

**CROSS-PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOHN H. DOUGHERTY,
Proctor for Petitioner Vessel
Warner Building,
Washington 4, D. C.

VICTOR S. CICHANOWICZ,
CHARLES N. FIDDLER,
On Brief.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement of the Matter Involved	3
Reasons for Granting the Vessel's Writ	4
Conclusion	6
APPENDIX TO CROSS-PETITION:	
Opinion of the Court	7
Judgment	14
Opinion of the Court on Petition for Rehearing	15
Order Sur Petition for Rehearing	16
Stevedore Contract Referred to by District Court ..	17

CASES CITED

Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U. S. 124	4, 5
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 89	5
Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U. S. 563 (1958)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No.

JOACHIM HENDRIK FISSER, Her Engines, Tackle,
Apparel, etc., *Petitioner*,

AGAINST

NACIREMA OPERATING CO., INC., *Respondent*.

**CROSS-PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioner, *SS Joachim Hendrik Fisser*, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in the proceeding docketed in said Court of Appeals as No. 12,140 insofar as such judgment did not consider the question of the right of the petitioner to indemnity against

Nacirema Operating Co., Inc., the respondent-impleaded. This petition, however, is prayed for only in the event that a writ of certiorari is granted to the libelant, in which event the entire case may be determined by this Court.

Opinions Below

The opinion of the United States District Court for the District of New Jersey is officially reported at 142 F. Supp. 389. The opinion of the United States Court of Appeals for the Third Circuit, reversing the decision of the District Court and dismissing the libel, is reported at 249 F. 2d 818. The opinion of the United States Court of Appeals for the Third Circuit, denying libelant's petition for a rehearing, is reported at 249 F. 2d 821.

Jurisdiction

The judgment of the Court of Appeals was entered on September 30, 1957. The petition for a rehearing was denied by the Court of Appeals on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Petitioner's application for an extension of time for filing this petition was granted by the Honorable William J. Brennan, Jr., Associate Justice of the United States, by order dated March 1, 1958 but without thereby determining the timeliness of said application.

Question Presented

The only question which would be involved in this application, if libelant's petition for a writ of certiorari should be granted, is whether the vessel would be entitled to recover indemnity from the respondent-impleaded for a breach on the part of the respondent-impleaded of its warranty to render workmanlike service on board the vessel *Joachim Hendrik Fisser*.

Statement of the Matter Involved

Suit was commenced by the libelant by the filing of a libel and the attachment in rem of the vessel *Joachim Hendrik Fisser* on January 4, 1954. On January 5, 1954, the Master of the vessel filed claim to said vessel on behalf of the owner, Hendrik Fisser Aktien Gesellschaft. On the filing of its answer, the vessel also filed a petition impleading Nacirema Operating Co., Inc., the contract stevedore and libelant's employer, pursuant to the 56th Admiralty Rule of this Court.

At the time of his accident, the libelant, John H. Crumady, as well as other longshoremen in the employ of Nacirema Operating Co., Inc. were working on board the vessel discharging timber pursuant to a written contract under which Nacirema Operating Co., Inc. obligated itself specifically to unload the vessel *Joachim Hendrik Fisser* in accordance with the terms and conditions therein expressed.

Under this contract, among other things, Nacirema Operating Co., Inc. undertook "to faithfully furnish such stevedoring services as might be required" and obligated itself to:

"b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operator, also foremen and such other stevedoring supervision as was needed for the proper and efficient conduct of the work."

This contract was entered into on December 30, 1953. It was made on the vessel's behalf by the agent for the time charterer of the vessel.

The libelant's petition for a writ of certiorari which has already been filed with this Court, urges that a writ should be granted in his favor and the decision of the Court below reversed because the failure of the stevedore to render workmanlike service rendered the vessel unseaworthy. While under the facts of this case this concept is not conceded and, as will be shown in the vessel's brief in opposition to libelant's petition for a writ of certiorari, is contrary to the principles of law as defined by this Court, the question of indemnity is vital to a complete determination of this case. Thus, if the petition of the libelant should be granted, it would be in the interest of justice also to grant the cross-petition of the vessel for a writ of certiorari.

Reasons for Granting the Vessel's Writ

1. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U. S. 124, this Court held that where, under a stevedoring contract, the stevedore obligates itself to "faithfully furnish such stevedoring services as may be required" and to provide all necessary labor and supervision for "the proper and efficient conduct of the work", such language constitutes "a contractual undertaking to (perform) 'with reasonable safety'" (350 U. S. at 130) and to discharge "foreseeable damages resulting to the shipowner from the contractor's improper performance" (350 U. S. at 129, footnote 3). See also *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563 (1958).

Thus, if, as the libelant contends, the negligence of the stevedore created the conditions which brought about the libelant's accident, the stevedore breached its contractual undertaking to perform with reasonable safety and should, therefore, indemnify the vessel for the damages resulting from the improper performance of the contract.

The fact that the stevedoring contract was made on behalf of the vessel by the agent of the time charterer does not bar indemnity. This Court also in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U. S. 124, held that the stevedore's warranty of workmanlike service was comparable to a "manufacturer's warranty of the soundness of its manufactured product" (350 U. S. at pp. 133-134) and because of this held that the shipowner, on whose behalf the stevedore contracted to perform the stevedoring services, was entitled to indemnity. Since, under the established law, it is fundamental that a manufacturer's warranty does not extend only to those with whom the vendor or manufacturer is in direct privity but goes beyond that relationship and includes within the privity anyone receiving the goods, the stevedore's warranty of workmanlike service here also necessarily includes the vessel.

It would thus be contrary to the established law to subject the vessel to a liability predicated on a maritime lien which the stevedore's breach of duty imposed but deny the vessel the legal right to obtain redress from the stevedore whose acts created the lien solely because the vessel, for whose explicit benefit the contract was made, being an inanimate object, was unable to go through the physical act of itself making the contract with the stevedore.

2. In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 89, this Court noted that it was precluded from making any determination with respect to the possible rights and liabilities as between the indemnitor and indemnitee because one of the necessary parties thereto was not named in the

case before the Court nor served, as was evidently required. In order to obviate this difficulty here, the vessel, therefore, prays that its cross-petition be granted so that this Court may be in a position to determine the rights and liabilities of all the parties in the event the libelant obtains the relief he has prayed for and thereby avoid a circuitry of actions.

CONCLUSION

This Court should therefore, grant the petition of the vessel and the claimant and determine that the respondent impleaded below breached its warranty of workman-like service and should indemnify the vessel.

Respectfully submitted,

JOHN H. DOUGHERTY,
Proctor for Petitioner Vessel

VICTOR S. CICHANOWICZ,
CHARLES N. FIDDLER,
On Brief.

APPENDIX TO CROSS-PETITION

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,138

No. 12,139

No. 12,140

JOHN H. CRUMADY, APPELLANT IN No. 12,138

v.

JOACHIM HENDRIK FISSER, HER ENGINES, TACKLE,
APPAREL, ETC., AND JOACHIM HENDRIK FISSER
AND/OR HENDRIK FISSER,

Respondents

v.

NACIREMA OPERATING CO., INC., IMPEADED
RESPONDENT-APPELLANT IN No. 12,140
HENDRIK FISSER AKTIEN GESSELLSCHAFT,
CLAIMANT-APPELLANT IN 12,139

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Argued June 13, 1957

Before MARIS, STALEY and HASTIE, *Circuit Judges.*

(Filed September 30, 1957)

*Appendix to Cross-Petition**HASTIE, Circuit Judge.*

Proceeding in rem against the ship Joachim Hendrik Fisser, the libellant Crumady has sued in admiralty to hold the ship and its owners responsible for personal injuries suffered by him while working on the ship as a stevedore employed by Nacirema Operating Co. in the unloading of the vessel at a berth in Port Newark, New Jersey. The respondent impleaded libellant's employer, Nacirema Operating Co., seeking thereby to obtain indemnification for any loss it might suffer through this suit.

After full hearing the court held the ship liable, ruling that one factor which contributed to the accident was the unseaworthiness of certain equipment of the ship. The court also allowed the ship to recover over against Nacirema, the party whose negligence, in the court's view, was the "sole, active or primary cause" of the accident.

Each of the parties has appealed. The ship challenges the ruling as to unseaworthiness. Nacirema claims that in any event there was no basis for holding it to indemnify the ship. The libellant complains that the amount of the award was erroneously determined and grossly inadequate.

We consider first the way the issue of unseaworthiness arose and was determined. The libel itself asserted a claim in admiralty for injury caused by the negligence of a ship and its owners, and nothing else.¹ There was no claim

1. Since *Pope & Talbot, Inc. v. Hawk*, 1953, 236 U. S. 406, it has been authoritatively established, if not unanimously agreed, that admiralty affords an injured workman so situated as libellant two distinct causes against the ship, one for negligent injury and the other for injury caused by the unseaworthiness of the vessel, although, of course, there can be only one recovery of damages for the same personal injuries.

Appendix to Cross-Petition

that unseaworthiness caused the accident or even that any unseaworthy condition existed. However, discussion at a pre-trial conference seems to have led the court to conclude that libellant's contentions included a claim predicated upon unseaworthiness. In any event, the transcript of the trial judge's statement at the conclusion of the pre-trial conference shows that he undertook to frame the issues, saying, apparently with the acquiescence of the parties, that the libellant "contends in effect that the injuries complained of resulted from the unseaworthiness of the vessel. . . ." In addition, the court made it clear that the structure alleged to have been unseaworthy was a cable or topping-lift which parted causing a boom which it supported to fall upon the libellant. Thereafter, libellant's proof was directed at establishing that the topping-lift was worn and defective and, for that reason, parted under the strain of lifting cargo which sound gear would have withstood.

The evidence relevant to this theory of liability was conflicting and the court, with adequate basis in the record, found as a fact that the topping-lift was not defective but "was adequate and proper for the loads for which the rest of the gear was designed and intended". The court also found quite properly that Nacirema's employees, libellant's fellow stevedores, were negligent in their conduct of the unloading operation. More particularly, attempting to lift long and heavy timber from the hold they permitted the load to catch under the coaming at the margin of the hatch from which it was being removed. In addition, though forbidden to change the position of the head of the boom which the crew of the vessel had placed over the center of the hatch, they had changed the attachment of the preventer and guy which controlled the position of the boom so that

Appendix to Cross-Petition

the head of the boom was no longer over any part of the hatch but had been moved a distance to port of the hatch opening. The excessive and abnormal strain which this incorrect procedure imposed upon the topping-lift will be discussed later. It suffices to point out now that the court with justification attributed the accident primarily to this negligence of Nacirema.

But having thus eliminated the basis of unseaworthiness formulated at pre-trial, the court found and adopted a new theory of the ship's unseaworthiness and responsibility which libellant had not pleaded and, so far as we can determine, had not attempted to establish in his proof. An understanding of the court's reasoning requires the consideration of additional circumstances not heretofore mentioned.

The gear being used at the time of the accident was rated and approved to lift a load of three tons or less. In the actual unloading operation a cable, called a cargo runner, was attached to the object to be lifted from the hold. This runner extended upward over a block at the end of a boom high above the hold and thence to and around a winch powered by an electric motor. The electrical equipment in this case included an automatic circuit breaker which stopped the flow of power to the winch whenever the current built up beyond the amperage for which the device had been set. Witnesses were asked to relate the cut off amperage to the strain imposed upon the winch by the load it was lifting. The witnesses agreed that the cut off was set so that if the motor should be required to overcome a strain on the cargo runner somewhat in excess of six tons the current would quickly build up to the setting of the circuit breaker and the motor would automatically cut off. In this case, the motor did cut off, apparently just before the topping-lift parted.

Appendix to Cross-Petition

The libellant seems to have introduced testimony about the cut off device in an effort to show that the power was cut off before the gear was subjected to any greater strain than it should have been able to withstand. But in analyzing this testimony, much of which was a rather confused discussion of "load" and "torque" and other electrical concepts induced by questions addressed to the witnesses as though the concepts were mechanical rather than electrical, the court concluded that it was unsafe practice, rendering the gear unseaworthy, to have the cut off set so that the circuit would not be broken until the tension in the cargo runner should exceed six tons. In other words, the court thought the rating of the gear to handle a cargo load of three tons indicated that it was unsafe to have the circuit breaker so set that the cargo runner might be subjected to a six ton strain.

While the court's reasoning was in accord with an opinion expressed by a witness, the application of mathematics to the undisputed facts requires the rejection of that opinion and the acceptance of other testimony, based in part upon a Coast Guard standard for the setting of such a control, indicating that the setting of the cut off device was entirely safe and proper. The testimony was clear and undisputed that hoisting gear of the kind in suit is rated to lift a load not more than one fifth of the strength of the cable itself. Thus, gear rated to handle a three ton load utilizes cable adequate to withstand a strain of fifteen tons. Such cable was used here. It is clear, therefore, that subjecting the cargo runner to a strain of six tons did not in itself create any undue risk of breakage. Indeed, as the testimony shows and the laws of physics teach, inertia, friction and the normal circumstances of operation make it necessary that substantially more than a three ton strain

Appendix to Cross-Petition

be imposed upon the gear before a three ton load can be lifted. Thus, the electrical equipment must and safely can impose a strain on the runner much greater than the weight to be lifted.

This was demonstrated by what happened in the present case. A strain of six tons or more on the cargo runner had no effect on that cable. The circuit breaker cut off the power at that point, while the strain was still well within the capacity of the cable. By the same token, if this operation had been conducted normally and properly the strain on the topping-lift would have been well within its capacity when the circuit breaker intervened. For this part of the gear also was rated to handle three tons of cargo and thus could withstand a fifteen ton strain.

The decisive fact, as the court found, it, was that the employees of Nacirema had so changed the position of the head of the boom as to seriously distort the normal composition of forces which is presented by a straight lifting operation. It was for this reason that the topping-lift was subjected to an enormous, abnormal and unanticipated strain. On the basis of expert testimony the court found as a fact that this strain was somewhere between seventeen and twenty-one tons, three or four times the strain then being imposed on the cargo runner and the winch.

This analysis leads to two conclusions. It was a proper finding that the negligence of the stevedores was "the sole active or primary cause" of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema "brought into play the unseaworthy condition of the vessel". The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its

Appendix to Cross-Petition

intended purpose.² Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred.

A decree should have been and now must be entered denying the libellant recovery. In these circumstances we do not reach the substantial question raised by the impleaded respondent whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained.

The judgment will be reversed.

2. *The Silvia*, 1898, 171 U. S. 462; *Doucette v. Vincent*, 1st Cir. 1952, 194 F. 2d 834; see *Berti v. Compagnie de Navigation Cyprien Fabre*, 2d Cir. 1954, 213 F. 2d 397, 400. Cf. *The Daisy*, 9th Cir. 1922, 282 Fed. 261.

*Appendix to Cross-Petition***Judgment**

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk

September 30, 1957

*Appendix to Cross-Petition***Opinion of the Court on Petition for Rehearing**

(Filed December 5, 1957.)

Before BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE,
Circuit Judges.

PER CURIAM:

A petition for rehearing is presented for our consideration on a theory of unseaworthiness which seems not to have been advanced in the trial court and has not heretofore been urged on this appeal. We find no such merit in this or any other contention as would warrant a rehearing. Accordingly, the petition for rehearing is denied.

BIGGS, *Chief Judge*, dissenting.

My brother Hastie's succinct opinion expressing the majority view as to why the accident to Crumady occurred raises an issue which requires rehearing before the court *en banc*. The majority opinion correctly concludes that Crumady was injured because a seaworthy boom, topping lift and tackle were employed to lift cargo from the vessel's hold but because the boom and topping lift were wrongly positioned by the stevedoring crew too great a strain was put on the boom and topping lift causing the topping lift to break.

Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), *aff'd per curiam* 347 U. S. 396 (1954), held that the responsibility of the ship owner was not shifted to the stevedoring crew because that crew brought on board and made use of a defective block which caused Petterson's injuries. The Court of Appeals for the Second Circuit in Grillea v.

Appendix to Cross-Petition

United States, 232 F. 2d 919 (1956), held that where longshoremen placed a seaworthy, but wrong, hatch-cover over a "padeye", and thereafter a longshoreman stepped on the hatchcover which gave way under him, causing him serious injuries, the ship was liable. In the case at bar, it would appear that a logical and necessary extension of the principles enunciated in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), and in *Petterson*, would require the holding that the ship was liable for the wrongful positioning of the boom and the topping lift despite the fact that the stevedoring crew, of which Crumady was a member, placed the boom and the topping lift in position. This is a doctrine to the effect that a "seaworthy" round peg placed in a "seaworthy" square hole will render the whole unseaworthy. While it does not appear how long a time elapsed between the positioning of the boom and the topping lift and the occurrence of the accident in the case at bar, it is clear that some time necessarily elapsed.

For these reasons I conclude that rehearing should be had before the court *en banc*.

Order Sur Petition for Rehearing

Present: BIGGS, *Chief Judge*, and MARIS, STALEY and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated: December 5, 1957

Appendix to Cross-Petition

Stevedore Contract Referred to by District Court

(Appellant's Appendix 33a)

This agreement, made and entered into this 30th day of December, 1953 between Insular Navigation Company as Owner, Operator, Charterer or Agent, and Nacirema Operating Co., Inc. Contractor, will govern, the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of Port Newark, New Jersey effective December 30, 1953 and the Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor, at the agreed rates, terms, and conditions specified below:

DISCHARGING

385,000 Board Feet Nicaraguan Pine from m.v. "Joachaim Hendrik Fisser" scheduled to arrive Port Newark January 2.

Rate: \$4.75 Per thousand BM if stowed fore and aft.

Rate: \$5.75 Per thousand BM if stowed crisscrossed.

Contractor agrees to furnish service of delivery clerk during discharge of vessel at actual cost plus 10% for overhead and supervision.

1. **TYPE OF VESSELS:** The stevedoring rates specified in this agreement apply to cargo vessels including those vessels with minimum passenger accommodations.

2. **COMMODITY RATE INCLUSIONS:** As part of the foregoing specified rates, the Contractor agrees to include in the commodity rates the following described services:

Appendix to Cross-Petition

- a. Transport Contractor's gear and equipment to and from the pier where the vessel is berthed, excepting locations that are inaccessible to motor trucks.
- b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work.
- c. Adjust rigging of booms and guys, etc., at hatches where work of discharging and/or loading will be conducted and unrigging when completed, also removing and replacing beams and hatch covers.
- d. Discharge cargo from or load cargo into vessel's holds, tween decks, on deck, shelter or bridge spaces, deep tanks, cargo lockers and lazarettes, also temporary bunker spaces, but excluding fore and aft peaks and bilges.
- e. Shift gangs as required between inshore and off-shore, also from lower to upper floor (or vice versa) on double deck piers. Shift lighters into working position after they have been placed alongside vessels, when this can be done without tugs.
- f. Sort (by longshoremen) and stack cargo man high on pier upon discharge of vessel or break down cargo from man high on pier upon loading of vessel.
- g. Perform such long trucking as required within limits of pier where vessel is berthed—limited to the section occupied by the vessel, should the pier have multiple sections.

Appendix to Cross-Petition

- h. Load and lay dunnage boards (except freighted dunnage lumber) as required during loading for proper stowage of cargo.
- i. Work two gangs simultaneously in hatches when required and when practical to do so, provided necessary additional booms, falls and winches are supplied by vessel or from shore facilities.

3. **EXTRA LABOR SERVICES:** When required to supply extra labor, the Contractor will render its charges therefor upon the basis of the labor cost incurred plus 10% and insurance at 15½% for the following described services:

- a. Handling ship's lines and gangways.
- b. Cleaning ship's holds.
- c. Discharging excess dunnage or debris.
- d. Tiering cargo on pier above man high upon discharge of vessel or breaking down cargo on pier to man high upon loading of vessel.
- e. Loading or discharging ship's stores, material or equipment, mail, baggage, specie, bullion, livestock, animals, live poultry and birds.
- f. Carpenter or coopering work of any nature.
- g. Handling and placing flooring or timbers for heavy lifts or for use by carpenters.
- h. Services of Harbormaster for the berthing and unberthing of lighters.
- i. Lashing and shoring cargo.
- j. Bolting and unbolting tank lids.

Appendix to Cross-Petition

k. Battening down hatches when called upon to do so upon completion of the vessel.

l. Rigging and unrigging heavy lift booms.

m. Supplying extra labor for any other services when authorized.

4. RIGGING/UNRIGGING HATCH TENTS: When required to use hatch tents, the Contractor will charge \$20.00 per tent to represent the initial rigging and final unrigging combined; and no charge will be made for intermediate rigging or unrigging of the tent during the working of the vessel.

5. INCOME FROM HANDLING LIGHTERS AND CARS: The Contractor shall collect and retain its customary charges for labor services in connection with the loading and unloading of railroad cars, lighters, barges and scows.

6. EQUIPMENT: The ship is to supply booms, adequate winches, in good order and with sufficient steam or current for their efficient operation; blocks, topping lifts, guys; wire or rope falls of sufficient length and strength, hatch tents, lights for night work; tugs; derricks or cranes for such heavy lifts as exceed the capacity of the ship's gear, and cranes in the absence of ship's winches. The ship is also to supply dunnage, paper and all material for shoring and lashing cargo as well as grain bags and separation cloths.

The Contractor is to supply all other cargo handling gear and equipment, such as hooks, pendants, save-alls, nets, trays, bridle chains and slings (except slings for heavy lifts when hoisted by heavy lift floating or shore derrick) also hand trucks, mechanical trucks or tractors,

Appendix to Cross-Petition

also dock tractor cranes as needed for efficient stevedoring work.

7. **INSURANCE:** The Contractor agrees to carry and include in the rates herein specified, Workmen's Compensation Insurance for the unlimited protection of its employees under State and Federal Laws, also Public Liability Insurance for the protection of third parties who have suffered, or alleged to have suffered death or bodily injuries thru the acts of the Contractor's Employees, such Public Liability Insurance to be in the amount of \$50,000 for bodily injury or death of one person, and \$150,000 for death or injury to more than one person in a single accident.

The rates specified herein also include Social Security Taxes and Unemployment Insurance as presently payable by the Contractor. Whenever actual labor wages are to be charged for by the Contractor under this agreement, the Social Security Taxes and Unemployment Insurance incurred thereon shall be added to charges for Workmen's Compensation and Public Liability Insurances, and all such charges shall be termed "Insurance".

8. **RESPONSIBILITY FOR DAMAGE OR LOSS:** The Contractor will be responsible for damage to the ship and its equipment, and for damage to cargo, or loss of cargo overside, through its negligence. When such damage occurs to ship or its equipment or where loss or damage occurs to cargo by reason of such negligence, the Ship's officers or other authorized representatives will call this to the attention of the Contractor at time of accident.

Appendix to Cross-Petition

Property Damage Insurance in an amount of \$1,000,000 with deductible amount of not over \$10,000.

9. **DETENTIONS, WAITING, DAY TIME:** Whenever work is interrupted after starting and detentions of not over 20 minutes duration occur, the Contractor will make no charge for reimbursement therefor. Should such detention time exceed 20 minutes duration, the Contractor will charge for the full detention time at labor cost plus insurance. When men are employed and unable to work through causes beyond the Contractor's control, or when men are to be paid for a minimum working period in accordance with the wage agreement, the cost of such waiting or idle time will be charged for by the Contractor at labor cost, plus insurance at 15½%.

10. **OVERTIME:** When overtime hours are worked, the additional wages thereby incurred and paid to all labor and other stevedoring personnel so employed, will be charged for by the Contractor at cost, plus insurance.

In the event that, under any Government Order or final determination by a court of competent jurisdiction, labor is required to be paid wages in excess of the wages paid under the Federal Fair Labor Standards Act as presently interpreted throughout the port, such wages plus insurance and social security and unemployment taxes together with any additional amount other than wages for which the Contractor may be legally liable under the Act, shall be reimbursed to the Contractor by the Owners, Agents, or Charterers at cost.

11. **TRAVEL TIME AND TRANSPORTATION:** When the Contractor is required to work at locations where travel time

Appendix to Cross-Petition

is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at cost, plus insurance. When vessels are worked in the stream or other places where means of transportation for the men are required or meal allowances must be paid in accordance with the wage agreement, any expense so incurred will be charged for at cost.

12. **STRIKES, ETC.:** In the event of strikes, lockouts, Union disputes or other labor difficulties, the Contractor will, if able to work, do so upon a basis of cost, plus 20% and insurance at 15½% in lieu of rates specified, unless notified by the Owners, Agents or Charterers that no work is to be performed.

13. **INCREASE OR DECREASE IN WAGES:** All rates specified are based on and subject to the employment of present longshore labor at the wage scale and working conditions existing in the port in the month of September 1953 under the International Longshoremen's Association Agreement. In the event of an increase or decrease in such wage scale or change in the present longshore labor or working conditions, the rates specified herein shall as a consequence be proportionately increased or decreased.

14. **REHANDLING OR SHIFTING OF CARGO:** The rates specified herein apply to one handling of cargo. When rehandling, resorting or shifting of cargo is necessary through no fault of the Contractor, the time required for such work will be charged for by the Contractor at cost, plus 10% for overhead and gear, plus insurance at 15½%.

15. **DAMAGED CARGO:** When handling cargo damaged by fire, water, oil, etc., and where such damage causes dis-

Appendix to Cross-Petition

tress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Contractor's charges are to be based on the labor cost in accordance with the International Longshoremen's Association Argeement, plus 20% for overhead, depreciation of gear, and profit, plus insurance at 15½% in lieu of the rates specified herein together with the cost of the gear destroyed and the cost of the equipment for the protection of the men as may be required.

16. **CONDITIONS OF CARGO:** If the condition of the cargo or packages is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

17. **AMMUNITION AND EXPLOSIVES:** Are not included in this agreement.

18. **ACTS OF GOD, WAR, ETC.:** No liability shall attach to the Contractor, if the terms of this agreement cannot be performed, due to the Acts of God, War, Governments, Fire, Explosion, or Civil Commotion.

19. This agreement may be terminated, modified or amended upon thirty days' notice by either party, provided, however, that notwithstanding any such termination, the Contractor shall continue to be responsible for the loading or discharging of any cargo which the Contractor is handling on the effective date of such termination. Termination of this agreement shall not affect or relieve either party of any liability or obligation that may have accrued prior thereto.

Appendix to Cross-Petition

20. This agreement does not include any services of clerks or checkers.

INSULAR NAVIGATION COMPANY
Owner/Operator/Charterer/Agent

By: J. J. SMITH

NACIREMA OPERATING Co., INC.
Contractor

By: ANDREW G. DANTZLER
Andrew G. Danzler
Vice Pres.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.

FILED

OCT 8 1956

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

October Term, 1956

No. [REDACTED]

62

JOACHIM HENDRIK FISSEB, Her Engines, Tackle,
Apparel, etc.,

Cross-Petitioner,

AGAINST

NACIREMA OPERATING CO., INC.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CROSS-PETITIONER

VICTOR S. CICHANOWICZ,
Counsel for Cross-Petitioner,
26 Broadway,
New York 4, N. Y.

JOHN H. DOUGHERTY,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Matter Involved	2
Summary of Argument	6
ARGUMENT:	
I. In the event of a reversal of the dismissal of the libel in No. 968, the cross petitioner is entitled to indemnity from the stevedore contractor to the full extent of petitioner's recovery	7
II. Under the facts of this case, the right to indemnity exists even in the absence of a direct contract between the stevedore contractor and the shipowner	10
CONCLUSION	11

CASES CITED

	PAGE
American District Telegraph Co. v. Kittleson, 179 F. 2d 946	10
Cornec v. Baltimore & O. R. Co., 4 Cir., 48 F. 2d 497	7
Crowell v. Benson, 285 U. S. 22	8
George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489	10
MacPherson v. Buick, 217 N. Y. 382	7
McFall v. Compagnie Maritime Belge, 304 N. Y. 314	8
Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp., 350 U. S. 124	7, 9
States S. S. Co. v. Rothschild Stevedoring Co., 205 F. 2d 253	8
Union Stockyards Co. v. Chicago B. & O. R. R. Co., 196 U. S. 217	10
Washington Gas Light Co. v. District of Columbia, 161 U. S. 316.	10
Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U. S. 563	8

STATUTE CITED

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901, et seq.,	8
---	---

AUTHORITY CITED

Benedict on Admiralty, 6th Ed., Vol. 1, p. 23	9
---	---

BRIEF FOR CROSS-PETITIONER

The case of the cross-petitioner comes before this Court conditioned on whether or not the relief prayed for in No. 968 is granted the petitioner in No. 968. Inasmuch as in No. 968 the Court of Appeals for the Third Circuit dismissed the libel because it found (concurrently with the District Court) that "The sole, active or primary cause" of the accident was the negligence of the stevedores, the question presented on this cross-petition will not be material except if the decision of the Court of Appeals should be reversed. In such event this Court is requested to review the question of the right of the cross-petitioner to indemnity against the employer of the petitioner in No. 968 and award full indemnity.

Opinions Below

The opinion of the United States District Court for the District of New Jersey is officially reported at 142 F. Supp. 389. The opinion of the United States Court of Appeals for the Third Circuit, reversing the decision of the District Court and dismissing the libel, is reported at 249 F. 2d 818. The opinion of the United States Court of Appeals for the Third Circuit, denying libelant's petition for a rehearing, is reported at 249 F. 2d 821.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 30, 1957. The order denying rehearing was entered on December 5, 1957. On March 1, 1958, by order of Mr. Justice Brennan, the time within which to file a cross-petition for certiorari was extended to May 2, 1958 (R. 132). The peti-

tion was filed May 2, 1958 and was granted June 9, 1958 (R. 133). The jurisdiction of this Court rests on 28 U. S. C. Section 1254 (1).

Question Presented

Whether a stevedore contractor who enters into a written contract to unload a vessel specifically named in the contract and to that end agrees to provide such labor and supervision as is needed for the proper and efficient conduct of this work can escape liability for indemnity where its negligence in the manner in which it conducted the work is the sole, active or primary cause of the accident, solely because the party with whom the stevedore made the contract was the agent of the time charterer of the vessel rather than the owner himself?

Statement of the Matter Involved

On January 2, 1954 John Crumady, a longshoreman in the employ of Nacirema Operating Co. Inc. was injured on board the *S. S. Joachim Hendrik Fisser* when a boom fell when the topping lift supporting it broke because it was subjected to excessive strain as the libelant and his fellow employees were attempting, by the continued application of power to the ship's electric winch to lift a timber, which they had caused to become jammed or drawn against the under edge of the hatch coaming. On January 4, 1952 suit on behalf of Crumady was commenced by the filing of a libel and the attachment *in rem* of the *S. S. Joachim Hendrik Fisser*. On January 5, 1952 the Master of the vessel filed claim to said vessel on behalf of its owner, Hendrik Fisser Aktien Gesellschaft. Other than as claimant, Hendrik Fisser Aktien Gesellschaft was not required to appear in the action.

On the filing of the answer as claimant of the *S. S. Joachim Hendrik Fisser*, Hendrik Fisser Aktien Gesellschaft, in its capacity as claimant filed a petition impleading Nacirema Operating Co., Inc., the contract stevedore and libellant's employer, pursuant to the 56th Admiralty Rule of this Court.

On December 30, 1953, prior to the occurrence of Crumady's accident, Nacirema Operating Co., Inc. entered into a written agreement under which it agreed to discharge the *S. S. Joachim Hendrik Fisser*, on the occasion in question. This contract was made with Insular Navigation Company, agents for the time charterer of the *S. S. Joachim Hendrik Fisser*.

This agreement in part specified as follows:

"This agreement, . . . , will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of Port Newark, New Jersey effective December 30, 1953 and the contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the contractor, at the agreed rates, terms, and conditions specified below:

DISCHARGING

285,000 Broad Feet Nicaraguan Pine from *M. V. 'Joachim Hendrik Fisser'* scheduled to arrive Port Newark January 2.

2. Commodity Rate Inclusions: As part of the foregoing specified rates, the Contractor Agrees to include in the commodity rates the following described services:

(b) Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and dock crane operators, also foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work."

On June 27, 1956 after trial, the District Court rendered its decision allowing Crumady recovery against the vessel and awarded the vessel full indemnity against Nacirema Operating Co., Inc.

Although it concluded that "the sole, active or primary cause of the breaking of the topping lift" was the negligence of the longshoremen by reason of the negligent manner in which they attempted to extract a timber from the obstructed position beneath the deck of the vessel, the trial court nevertheless held the vessel liable on the theory that this failure to exercise reasonable care brought into play an allegedly unseaworthy condition of the vessel.

In allowing indemnity the trial court pointed out that even though the stevedore contractor had not made a contract directly with the owner of the vessel, its employees were impliedly, if not expressly, invited to come and be aboard the vessel for the purpose of unloading her cargo and to use the vessel's tackle and gear *in a manner appropriate for that purpose*. In consequence to this relationship to which the stevedore contractor had consented, the trial court held that it owed the vessel and her owners the duty of using due care in her unloading entirely apart from its obligation under the contract which it had made with the agent of the charterer of the vessel.

On appeal to the Court of Appeals for the Third Circuit by all of the parties to the action, the Court of Appeals reversed the District Court and dismissed the libel. The Appellate Court concurred with the trial court that the neg-

ligence of the stevedores was "the sole, active or primary cause" of the accident. It pointed out that "the concept of seaworthiness contemplates no more than a ship's gear shall be reasonably fit for its intended purpose." If found on the basis of mathematical calculations and a Coast Guard regulation that the ship's gear was in all respects fit for its intended purpose and that in the absence of anything which suggested that the misuse of the ship's gear was reasonably to be feared or anticipated, there was no basis for finding the vessel unseaworthy. It further pointed out that the ship's gear was thus not proved to be unseaworthy and that the setting of the cut-off device was not established as the legal cause of the accident which occurred.

Thereafter the petitioner in No. 958 filed a petition for a rehearing. In that petition the petitioner contended that if the sole cause of the accident was defective rigging by the longshoremen, the vessel should nevertheless be held liable. The Court of Appeals after pointing out that the theory advanced on the rehearing had not been advanced in the trial court or before in the appellate court, denied this petition on the ground that it found no merit in this or any other contention which could warrant a rehearing. Chief Judge Biggs, who did not participate in the initial appeal, filed a dissenting opinion suggesting a rehearing before the court in banc. Judge Bigg's suggestion completely overlooked the vital fact that when the accident occurred the longshoremen were putting the ship's gear to a use for which it was not intended and therefore was based on the sole premise that the accident occurred only because the stevedore crew had wrongly positioned the boom so that too great a strain was put on the boom and the topping lift.

Summary of Argument

If this court should reverse in No. 968 and allow the petitioner recovery against the vessel, it should under the circumstances of this case allow the vessel indemnity against the stevedore employer of the petitioner. The liability of the stevedore contractor for indemnity is not sought upon the basis of a duty which it and the shipowner owed to the petitioner, but arises solely from the duty which the stevedore contractor assumed in consequence of a relationship to which the stevedore contractor had consented. The stevedore contractor having assented to this relationship, cannot reject the responsibilities which such a relationship entails, solely because of the technicality that it came aboard and unloaded the vessel in question by reason of a written contract which the charterer's agent and not the owner itself signed. It is in a no better position with respect to such vessel than the stevedore contractor whose agreement is signed by the owner of that vessel.

On the other hand, the absence of a contractual relation does not in every instance preclude indemnity. The right to indemnity is recognized where the indemnitor and the indemnitee are not *in pari delicto*. It should all the more be recognized in cases where liability is visited on the shipowner where he may be without fault as the petitioner in No. 968 contends.

ARGUMENT

I

In the event of a reversal of the dismissal of the libel in No. 968, the cross-petitioner is entitled to indemnity from the stevedore contractor to the full extent of petitioner's recovery.

There is no question that the Nacirema Operating Co., Inc., entered into a contract to discharge lumber from the *S. S. Joachim Hendrik Fisser*, at the time in question and that under such contract it not only warranted but specifically agreed that it would provide the necessary labor and supervision as might be needed for the proper and efficient conduct of this work. This contract was not restricted to vessels owned or operated by Insular Navigation Company, but included all such vessels which might otherwise be controlled by Insular and as might be assigned to Nacirema and particularly the *S. S. Joachim Hendrik Fisser*. Thus Nacirema did not merely assume a duty to the *S. S. Joachim Hendrik Fisser* by reason of the fact that its employees went on board the vessel, as the trial court held, but it specifically agreed that in unloading this vessel the labor and supervision it would furnish would be such as was necessary for the proper and efficient conduct of the work.

The warranty which the Court in *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124, 133-134, said a stevedore owes when he goes aboard a vessel to perform stevedoring services, is comparable to a manufacturer's warranty of the soundness of its manufactured product. Such warranty is not limited only to those with whom the warrantor is in direct privity. *MacPherson v. Buick*, 217

N. Y. 382. As was pointed out in *Cornec v. Baltimore & O. R. Co.*, 4 Cir., 48 F. 2d 497, 502 (cited with approval by this Court in *Wyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563) the stevedore owes to the vessel and her owner the duty of using due care and when it fails to do so there is no known principle upon which the stevedore can be absolved for damages that are sustained as the result of the failure to use due care. Mere lack of direct privity is not such a principle as would absolve the stevedore under the facts in this case. Nor is the fact that the stevedore contractor was covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901 *et seq.*, serve to work a surrender of the rights which a third-party might have against Nacirema. This court's statement in *Crowell v. Benson*, 285 U. S. 22, 38, is significant. There it was stated:

" . . . it (the Longshoremen's Act) applies only when the relation of master and servant exists, Sec. 3."

It is not essential in order to give rise to the right to indemnity that the contract for the stevedoring services be directly between the indemnitor and indemnitee. Indemnity springs from an equitable doctrine. It is not dependent upon the legislative will but springs from contract, express or implied. *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314. As the Court of Appeals for the Ninth Circuit in *States S. S. Co. v. Rothschild Stevedoring Co.*, 205 F. 2d 253, stated:

"The fact that the permission to the stevedore company comes from the owner through the charterer does not relieve the stevedore company from liability."

Furthermore, to say that a stevedore contractor is required to render its services with competency and safety only if the shipowner hires him directly does violence to the very nature of the service which is undertaken. Competency and safety are inescapable elements of such service and it is impossible to divorce one from the other. In describing the inescapable nature of the duties which the performance of stevedoring service entails, this Court, in *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124, stated at page 133:

"It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workman-like service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

The fallacy inherent in any requirement that a direct contract is necessary in order to hold the stevedore contractor which created the condition that produced the injury liable for indemnity is emphasized when it becomes apparent that the vessel was held liable *in rem* in this case. As a practical matter, if such a requirement were carried to its ultimate conclusion, the vessel, though encumbered with a maritime lien because of the wrongful act of the stevedore, nonetheless could have no redress from the stevedore whose acts created the lien because the vessel physically was incapable of making the contract. Because of the very nature of the shipping business, the requirement that a direct contract with the owner must exist in order to enable the vessel or its owner to obtain redress for damage to the vessel would be very onerous indeed. From ancient times, the maritime law has imposed a contractual relationship between the vessel and the contracting party even though the contract made on

behalf of the vessel is made by someone else other than the owner. *Benedict on Admiralty*, 6th Ed., Vol. 1, p. 23. There is no more reason for absolving the stevedore from indemnity because it did not have a direct contract with it or the owner than there would be for absolving the vessel for any breach of a contract made on its behalf.

The weight of authority, therefore, supports the allowance of indemnity if the vessel should be held liable for damages here.

II

Under the facts of this case, the right to indemnity exists even in the absence of a direct contract between the stevedore contractor and the shipowner.

If the Court of Appeals should be reversed and recovery against the vessel allowed, no matter on what theory, the situation which exists under the facts of this case is not one in which the stevedore's breach of duty brings about injuries by operation upon a prior condition caused by the ship's negligence or unseaworthiness but instead one which the stevedore's breach of duty creates. Under these circumstances, indemnity is not sought on the theory of active or passive negligence but instead on the basis that the one whose acts by operation of law cast another in damages should indemnify him who has been compelled to pay. In such circumstances, the Courts have with unanimity recognized the right to indemnity regardless of whether or not there may have been a contractual obligation running from the indemnitor to the indemnitee. *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316; *Union Stockyards Co. v. Chicago B & O R. R. Co.*, 196 U. S. 217; *George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489; *American District Telegraph Co. v. Kittleson*, 179 F. 2d 946. This is in conformity with the holding of the trial court.

Conclusion

If the Court of Appeals should be reversed in No. 968, this Court should grant indemnity to the vessel which is the cross-petitioner herein against the stevedore contractor. Whatever liability may be visited on the vessel was caused and brought about by the failure of the stevedore to do its work in a safe and competent manner. The vessel's liability exists only by operation of law. The loss should, therefore, be placed upon the one who created the condition which caused the accident.

The judgment of the Court below should be affirmed.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Counsel for Cross-Petitioner,
26 Broadway
New York 4, N. Y.

JOHN H. DOUGHERTY,
Of Counsel.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.

FILED

MAY 27 1958

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~62~~ 62

JOHN H. CRUMADY,

Petitioner,

vs.

**JOACHIM HENDRIK FISSER, her engines, tackle, apparel,
etc., and JOACHIM HENDRIK FISSER, and/or
HENDRIK FISSER,**

Respondents,

vs.

NACIREMA OPERATING CO., INC.,

Impleaded Respondent.

**BRIEF FOR IMPEADED RESPONDENT IN
OPPOSITION TO CROSS-PETITION FOR
WRIT OF CERTIORARI.**

JOHN J. MONIGAN, JR.,

Counsel for Impleaded Respondent,

Nacirema Operating Co., Inc.,

744 Broad Street,

TABLE OF CONTENTS.

	PAGE
OPINIONS OF THE COURTS BELOW.....	1
JURISDICTION	2
QUESTION	2
STATEMENT OF THE CASE.....	2
ARGUMENT	4
Indemnity must be predicated upon a contract, express or implied, between the indemnitor and the indemnitee, and in the absence of an express agreement or a mutuality of obligation owed by them to a third person, there is no substan- tive right to such relief.....	4
CONCLUSION	11
APPENDIX	12

TABLE OF CASES.

	PAGE
<i>American Mut. Liability Ins. Co. v. Matthews</i> , 87 Fed. Supp. 854, (E. D. N. Y. 1949) reversed 182 Fed. (2d) 322.....	8
<i>American President Lines v. Marine Terminals Corp.</i> , 234 Fed. (2d) 753, (9th Cir. 1956), cert. den'd 352 U. S. 926.....	8
<i>Bordal v. Atlantic Maritime Co., Inc. et als.</i> , 127 F. Supp. 186, (E. D. Pa. 1954).....	8
<i>Brown v. American Hawaiian S. S. Co. et al.</i> , 211 Fed. (2d) 16, 18, (3d Cir. 1954).....	7, 9
<i>Crawford v. Pope & Talbot, Inc.</i> , 206 Fed. (2d) 784, (3d Cir. 1953).....	8
<i>Feinman v. A. H. Bull S. S. Co.</i> , 216 Fed. (2d) 393, (3d Cir. 1954).....	5
<i>Hagans v. Farrel Lines</i> , 237 Fed. (2d) 477, (3d Cir. 1956).....	10
<i>Halcyon Lines v. Haenn Ship. etc. Corp.</i> , 342 U. S. 282 (1952).....	5
<i>The Hindustan</i> , 37 Fed. (2d) 932, aff'd. memo 44 Fed. (2d) 1015 (CCA 2d 1930).....	4, 5
<i>Inhabitants of Lowell v. Boston and Lowell R. R. Corp.</i> , 23 Pick (Mass.) 24, (1839).....	6, 7
<i>LoBue v. U. S.</i> , 188 Fed. (2d) 800 (2d Cir. 1951).....	7, 8
<i>Long v. Silver Line</i> , 48 Fed. (2d) 15 (C. C. A. 2d 1931).....	5
<i>The Osceola</i> , 182 U. S. 158 (1903).....	4
<i>Petterson v. Alaska S. S. Co.</i> , 205 Fed. (2d) 478 (9th Cir. 1953), aff'd. memo 347 U. S. 396 (1954).....	5
<i>Read v. United States</i> , 201 Fed. (2d) 758 (3d Cir. 1953).....	8
<i>Rich v. United States</i> , 2 Cir. 177 F. 2d 688.....	9
<i>Ryan Co. v. Pan-Atlantic Corp.</i> , 350 U. S. 124 (1956).....	6, 7, 8

	PAGE
<i>Seas Shipping v. Sieracki</i> , 328 U. S. 85 (1946).....	4
<i>Slattery v. Mara</i> , 186 Fed. (2d) 134 (2d Cir. 1951), certiorari den'd. 341 U. S. 915 (1951).....	7
<i>States S. S. Co. v. Rothschild International Stevedoring Co.</i> , 205 Fed. (2d) 253 (9th Cir. 1953).....	8
<i>Union Stockyards Co. v. Chicago etc. R. R. Co.</i> , 196 U. S. 217 (1905).....	6
<i>United States v. Rothschild International Stevedoring Co.</i> , 183 Fed. (2d) 181 (9th Cir. 1950).....	8
<i>Washington Gas Co. v. District of Columbia</i> , 161 U. S. 316 (1896).....	6
<i>Westfield v. Mayo</i> , 122 Mass. 100 (1877).....	6

TABLE OF STATUTES.

28 U. S. C. §1254(1)	2
33 U. S. C. A. §901 <i>et seq.</i> 44 Stat. 1424.....	3, 6

TABLE OF OTHER AUTHORITIES.

103 U. of Pa. L. Rev. 321 (1954).....	8
70 Harv. L. Rev. 149 (1956).....	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 971

JOHN H. CRUMADY,

Petitioner,

vs.

JOACHIM HENDRIK FISSE, her engines, tackle, apparel, etc.,
and JOACHIM HENDRIK FISSE, and/or HENDRIK FISSE,
Respondents,

vs.

NACIREMA OPERATING Co., Inc.,
Impleaded Respondent.

BRIEF FOR IMPEADED RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported in 142 Fed. Supp. 389, (L16a)¹. The opinion of the Court of Appeals for the Third Circuit is reported in 249 Fed. 2d 818 (LP29). The opinion of the Court of Appeals on petition for rehearing is reported in 249 Fed. (2d) 821 (LP36).

¹ References are: L—libellant's appendix; LP—libellant's petition for certiorari; CP—cross-petition for certiorari; IRS—impleaded respondent's supplemental appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1957, (LP35). The order denying rehearing was entered on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question.

Is not indemnity unavailable in favor of a vessel against a stevedoring company in the absence of a contract between them when such indemnity is sought in respect of damages for injuries sustained by an employee of such stevedoring company?

Statement of the Case.

The facts which give rise to the present controversy have been set forth in the brief of the impleaded respondent in opposition to the petition for certiorari filed on behalf of John H. Crumady, petitioner, No. 968. It is necessary, however, in view of the statements in the cross-petition for certiorari (CP3) concerning the contract between the impleaded respondent and the Insular Navigation Company briefly to refer to that contract. Set forth in the appendix hereto is the complete colloquy of counsel in the trial court in connection with the proffer of that contract which was marked Exhibit R-14 for identification to which the trial court sustained the objection of the impleaded respondent. It appears from the contract that it was made by the impleaded respondent and the Insular Navigation Company, and contrary to the contention made in the cross-petition for certiorari (CP5), it was admitted by counsel for the respondent (*infra* page 15), that the contract was

made by Insular Navigation Company as agent for the charterer. It appears, also, from the same colloquy that the argument advanced in the cross-petition for certiorari that the vessel being an inanimate object could not make a contract on its own behalf (CP5) is clearly specious, since it appears as well from the contract, itself, that it was not made on behalf either of the vessel or the vessel's owner, and such was the holding of the trial court (*infra*, page 16).

In view of those circumstances, it was the contention of the impleaded respondent in the Court of Appeals that as a matter of law indemnity would not lie in favor of the vessel against it. The Court of Appeals determined that its decision respecting the libellant's allegations of the unseaworthiness of the vessel made it unnecessary to pass upon the substantial question thus raised (CP13).

It is the contention of the impleaded respondent that, since the right to indemnity which is asserted in the cross-petition can not be predicated upon any contract between the parties, the immunity created in its favor by the Congress in the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §901 *et seq.* 44 Stat. 1424) precludes any obligation on its part in respect of injuries sustained by one of its employees. It likewise is its contention that the doctrine of active and passive negligence upon which indemnity must be predicated in the absence of a contractual undertaking is unavailable to the respondent, since the impleaded respondent owed no duty to the petitioner except that which was imposed upon it by reason of the Longshoremen's and Harbor Workers' Compensation Act. As a consequence, regardless of the merits of the controversy between the petitioner and the cross-petitioner respecting the unseaworthiness of the

vessel, the effect of the decision of the United States Court of Appeals relieving the impleaded respondent from liability in indemnity should be affirmed without further review by this court.

ARGUMENT.

Indemnity must be predicated upon a contract, express or implied, between the indemnitor and the indemnitee, and in the absence of an express agreement or a mutuality of obligation owed by them to a third person, there is no substantive right to such relief.

The situation presented by the instant case is one which has occurred frequently since the decision of this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), rehearing denied *id.* 878, which imposed upon a vessel for the benefit of longshoremen the same obligation which it owed to seamen since the decision of the United States Supreme Court in *The Osceola*, 189 U. S. 158 (1903). That obligation was to indemnify the seamen for loss resulting from the unseaworthiness of the vessel or its gear. While the correctness of *The Osceola* and *Sieracki* decisions may well be questioned, they nevertheless must be accepted, since they have been frequently cited with approval.

Because of the harshness of the rule which imposes upon a vessel a financial obligation resulting from its unseaworthiness where such condition resulted not from its own fault but from the improper acts of others, cases in which vessels have sought to avoid their responsibility have been frequently before the courts.

At one time by reason of the so-called "control test", a vessel was able to escape liability to a person injured if its unseaworthiness resulted from the fault of persons other than the vessel or its crew, particularly when the damage resulted from the improper use of equipment which was not under its control, *The Hindustan*, 37 Fed. (2d) 932,

aff'd. memo 44 Fed. (2d) 1015 (CCA 2d. 1930); *Long v. Silver Line*, 48 Fed. (2d) 15 (CCA 2d 1931). That doctrine, however, was determined to be erroneous in *Petterson v. Alaska S. S. Co.*, 205 Fed. (2d) 478, (9th Cir. 1953), aff'd. memo 347 U. S. 396 (1954), and no longer can be used to exculpate the ship, *Feinman v. A. H. Bull S. S. Co.*, 216 Fed. (2d) 393, (3d Cir. 1954).

To accomplish a similar result, the admiralty doctrine of contribution in collision cases was used to limit the pecuniary responsibility of the vessel, but that device was held to be inapplicable to non-collision cases; and hence, contribution was not permitted where both the vessel and others were guilty of negligence, *Halcyon Lines v. Haenn Ship. etc. Corp.*, 342 U. S. 282 (1952). As a consequence, to relieve the ship owner of the obligation to respond in damages to an injured person in such circumstances, the doctrine of indemnity was explored.

That doctrine, in the absence of an express contract, had its origin in what was said to be a common-law principle stemming from implied contracts. In circumstances where two persons were under a legal obligation to a third person, the one who was held liable to the injured person without actual culpability but because of a breach of a non-delegable legally imposed duty was held to be entitled to indemnity from one whose conduct caused the injury. Typical of such cases is the situation in which a statutory obligation is imposed upon a municipality in the maintenance of highways. When such municipality is liable in damages to a person injured in consequence of the defective condition of such highway, which condition was caused by the negligence of a person hired by the municipality to perform work thereon, a municipality, nevertheless, is permitted to recover from such negligent person that which it has been obliged to pay to him who was hurt. Such was the

decision in the early case of the *Inhabitants of Lowell v. The Boston and Lowell R. R. Corp.*, 23 Pick. (Mass.) 24, (1839).

The principle thus established was considered an exception to the general rule that there could be no contribution between participants in a criminal action or between joint tortfeasors. To permit recovery, the existence of liability to the person injured and the imposition of damages upon one who was guilty of no active misfeasance but whose obligation to the injured party was imposed by operation of law without moral fault were required, *Westfield v. Mayo*, 122 Mass. 100 (1877). However, if the party who sought indemnity was guilty of a breach of duty in its own right to the injured person, implied indemnity is not permitted; and the general rule which precludes contribution between joint tortfeasors is applicable, *Union Stockyards Co. v. Chicago etc. R. R. Co.*, 196 U. S. 217 (1905). Cf. *Washington Gas Co. v. District of Columbia*, 161 U. S. 316 (1896).

Because of the divergent theories upon which a ship owner was permitted to escape financial liability to a person who was injured aboard a vessel and the conflicts engendered when indemnity was sought from a stevedore employer to whom the Congress granted immunity from responsibility in negligence to its employees in exchange for the mandatory responsibility to respond in compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.* 44 Stat. 1424, it is difficult to reconcile many of the reported cases. Since the decision in *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 (1956), however, it must be regarded as settled that the immunity granted to an employer against responsibility other than in the framework of the Longshoremen's and Harbor Workers' Compensation Act for injuries sus-

fained by its employees is not available to prevent a vessel's claim for indemnity when such employer has contractually obligated itself to indemnify or has contracted to perform work, if such injuries resulted by reason of the improper performance of the work which the employer contracted with the vessel to perform.

In the *Ryan* case, the majority of the Court⁶ (with four Justices dissenting) were of the opinion that indemnity would be permitted, although no express contract to indemnify existed, so long as the injuries resulted from the failure to perform the work contracted for in a reasonably proper manner. It likened the situation thus presented to that which existed in breach of implied warranties in the sale of goods and consequently permitted a vessel, which was held to be unseaworthy and hence liable to an employee of the stevedoring firm for personal injuries which he sustained, to recover the total amount of such damages from the stevedoring corporation, which, in violation of its contract, improperly loaded cargo aboard the craft which resulted in the injuries complained of.

In the absence of a contractual undertaking, it appears manifest that there can be no indemnity awarded against an employer in consequence of injuries sustained by its employee when such employee is covered by the Longshoremen's and Harbor Workers' Compensation Act, for unless circumstances exist which afford a basis for the application of the common-law doctrine of indemnity exemplified by the foregoing decision of the *Inhabitants of Lowell v. Boston and Lowell R. R. Corp.*, *supra*, there is no substantive right of action therefor. This principle was recognized in the cases of *Slattery v. Marra*, 186 Fed. (2d) 134, (2d Cir. 1951), certiorari den'd. 341 U. S. 915, (1951); and *Brown v. American-Hawaiian S. S. Co. et al.*, 211 Fed. (2d) 16, 18, (3d Cir. 1954). To like effect see: *Lo Bue v. U. S.*, 188 Fed. (2d) 800,

(2d Cir. 1951); *American Mutual v. Matthews*, 182 Fed. (2d) 322 (2d Cir. 1950); *Read v. United States*, 201 Fed. (2d) 758 (3d Cir. 1953); *Crawford v. Pope & Talbot, Inc.*, 206 Fed. (2d) 784 (3d Cir. 1953); *Bordal v. Atlantic Maritime Co., Inc. et als.*, 127 F. Supp. 186 (E. D. Pa. 1954). See also: 103 U. of Pa. L. Rev. 321 (1954); 70 Harv. L. Rev. 149 (1956).

The doctrine that a contractual or other special relationship between the parties was not essential to indemnity, represented by the decisions of *U. S. v. Rothschild International Stevedoring Co.*, 183 Fed. (2d) 181 (9th Cir. 1950) and *States S. S. Co. v. Rothschild International Stevedoring Co.*, 205 Fed. (2d) 253 (9th Cir. 1953), which was at one time apparently accepted in the Ninth Circuit before the decision in *Ryan Co. v. Pan-Atlantic Corp.*, *supra*, appears to have been repudiated by the decision in that Court of *American President Lines v. Marine Terminals Corp.*, 234 Fed. (2) 753 (9th Cir. 1956), cert. den'd. 352 U. S. 926, (1956); and the concurring opinion in *States S.S. Co. v. Rothschild International etc.*, *supra*, which recognized the necessity for a contractual or special relationship upon which the indemnity can be grounded, is now accepted in that circuit.

The applicable principles were well stated in *Crawford v. Pope & Talbot, Inc.*, *supra*, where it was said at page 792 [of 206 Fed. (2d)]

" . . . Section 5, [33 U. S. C. A. §905], however, does not insulate the employer from all liability to a third party from whom an employee has recovered damages. See *United States v. Arrow Stevedoring Co.*, 9 Cir., 1949, 175 F. 2d 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity

arising out of such contractual relations have not been considered barred by the section. See *Rich v. United States*, 2 Cir., 1949, 177 F. 2d 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. " * * " (Brackets ours.)

To like effect is the opinion in *Brown v. American-Hawaiian SS. Co.*, *supra*, at page 18 [of 211 Fed. (2d)]

" * * * There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employee for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the *Crawford* case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute

whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 412, 74 S. Ct. 202. * * *

Those decisions were cited with approval in *Hagans v. Farrell Lines*, 237 Fed. (2d) 477 (3d Cir. 1956).

Since there is no contractual relationship between the respondent and the impleaded-respondent in the instant case and both are not jointly obligated to the petitioner since the impleaded-respondent is liable to the petitioner only for Longshoremen's and Harbor Workers' compensation benefits, the requisite conditions for indemnity are absent. In such circumstances, it is impossible to attempt to evaluate active and passive negligence (as did the trial court, L34a), since the impleaded respondent owes no duty to the petitioner other than to pay him the prescribed longshoremen's benefits. That there can be no negligence unless there is a breach of duty is fundamental.

In the circumstances, then, there is no foundation, either factual or legal, for the allowance of indemnity to the vessel in the present case. The vessel and the impleaded respondent were not similarly obligated to the petitioner, and hence, the basis for common-law liability is not present. Without a contract between the parties, to permit indemnity deprives the impleaded respondent of the immunity given to it by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MONIGAN, JR.,
Counsel for Impleaded Respondent,
Nacirema Operating Co., Inc.

APPENDIX TO IMPEADED RESPONDENT'S BRIEF.

(IRS 1Sa et seq.)

Colloquy.

(829) Mr. Cichanowicz: I am only offering this, and the contract speaks for itself. Whether it is between the ship-owner or the charterer, I think the contract indicates that.

Mr. Monigan: My objection is directed to the competency of the proffered paper.

The Court: You have no objection to its authenticity?

Mr. Monigan: No, your Honor.

The Court: I would be ruling in a vacuum unless I knew what the document contained. If you want to show it to me I will endeavor to make a ruling upon the present objection which goes to its competency.

Mr. Monigan: Quite so, your Honor, it appears on the first page of the agreement which I think perhaps should be designated by an identification number so the record will reveal the matter which we are talking about.

It is between Insular Navigation Company and Nacirema Operating Company, it being a contract in writing and it cannot possibly bind anyone other than those who are parties thereto; that so far as the respondent-impeaded is concerned, the agreement is not made with any parties to the present action and (830) therefore it is not competent to bind Nacirema in respect of the action between the Crumady, libellant, and the vessel, respondent.

The Court: There is no question, is there, Mr. Monigan, but that Nacirema Operating Company, Inc., is a party to this document?

Mr. Monigan: No question, your Honor.

The Court: And the other party seems to be Insular Navigation Company in its capacity as owner, operator, charterer or agent.

Mr. Monigan: That is so. The reason that the matter becomes of concern at this stage of the proceedings, is that I assume counsel for the vessel is offering this document in

Colloquy.

order to avail themselves of the doctrine of those cases which concern themselves with an alleged breach of a stevedoring contract between a vessel and a stevedore.

This contract which has been proffered by counsel for the vessel manifestly is not a contract between the vessel and the stevedoring company. There has been some authority in the very few cases in which this matter has come before the court, as your Honor knows, it is one of relatively recent origin under the *Ryan Stevedore* case in which there being no indemnity, that is no written indemnity for a loss such as the (831) libellant sustained in the present matter, the only relevancy or competency of the matter is because of an alleged breach of a contract to stevedore.

Now, there was in the *Ryan* case, of course, a direct contract between the vessel and the stevedore and it was upon the implied warranty akin to that which was under the Sales Act in which the court in the *Ryan* case permitted an action by the vessel over the cause of a breach of a warranty.

Now, the situation in respect to the analogy of breach of warranty which was applied by the Court in the *Ryan* case would preclude the vessel, which is not a party to this contract, from asserting any breach of warranty because of the absence of privity of contract.

In the writing itself there is no suggestion that the contract was made for the benefit of the vessel and indeed the only case which I have been able to discover in which a contract such as this which is proffered by counsel was offered in evidence was an attempt to justify on the third party beneficiary theory and that was denied by the court. It was in the District of California.

We also have one in our own district which is not a stevedoring contract but it suggests the general rule which is applicable to such contracts, that in (831) order that there be a cause of action possible under the contract there must be a clearly intended purpose on the part of both contracting parties to create a benefit in another person.

Colloquy.

Now, the case to which I have reference in the Southern District of California, is 72 Fed. Supp. 574, at 588. There was a contract between the—well, let us put it this way: The United States contracted with a shipyard to build a vessel. The vessel was built. It was under lend-lease to the Ministry of Transport of the United Kingdom. The United States made a contract with the stevedoring company to load the vessel which was to go to the Far East. A longshoreman was injured aboard the vessel and this matter of liability of the stevedores' employer was brought before the court. It was a complicated case because of the sovereign immunity and diplomatic immunity and so on, but so far as here pertinent the court's opinion on page 588 of 72 Fed. Supp. says that that contract between the United States and the stevedoring company was not a contract for the benefit of the third party, so that it would inure to the benefit of the Ministry of Transport of the United Kingdom.

I believe that the analogy to the present matter is quite evident.

(833) The second case to which I had reference was the Isbrandtsen Line against Local 1291. That is the Court of Appeals in the Third Circuit, 204 Fed. (2d) 495. That was not a stevedoring contract in the same sense that we are discussing it here, it was a cause of action which was sought to be alleged by the vessel because of delay in the loading of the vessel.

The Court: Was there demurrage involved?

Mr. Monigan: I believe so, and the charterer of the vessel had made the contract with the stevedores and the Court of Appeals said that that contract was not one for the benefit of the vessel, and hence, whatever undertakings the stevedore made—stevedores made with the charterer were not such as to benefit the vessel.

For those reasons I believe that the proffer of the paper writing bearing date December 30, 1953, between Insular Navigation and Nacirema Operating Company is not admis-

Colloquy.

sible in the present matter since Insular Navigation is not a party to the action, the only basis for the liability asserted against the respondent-impleaded must be that which the vessel itself asserts or its owner, and neither is a party to the contract proffered.

(834) The Court: What have you to say to the objection of counsel on the grounds stated therefor, Mr. Cichanowicz?

Mr. Cichanowicz: I have very little to say, that the offer is being made on the theory that the shipowner was a third part beneficiary of this contract. There was no contention being made that the contract was made directly with the vessel, and I believe that it is evident from the wording of the contract that there was—or that the shipowner was a third party beneficiary. I believe that differs from the situation of the cases mentioned by counsel.

The Court: Let me interrupt you there. The only indication of a possible interest of a concern other than Insular Navigation Company and the vessel is to be found in the characterization of Insular Navigation Company as owner, operator, charterer or agent. *Assuming that the last of those words, agent is the one to be relied on, does it indicate—does the document indicate anywhere for whom Insular Navigation Company was acting as agent in entering into the contract.*

Mr. Cichanowicz: No, it does not. We will go one step further and say that in fact, I believe that Captain Jacobson testified that they made it as agent (835) for the charterer. I mean, I will make that statement on the record. (Italics supplied.)

The Court: Entirely apart from that what is the purpose of your offer? What do you want to show by this document?

Mr. Cichanowicz: Primarily to show what the obligation of the stevedore was under the contract, and also to show the fact that this loading was done according to the footage instead of by hours and things of that nature.

Colloquy.

The Court: There is no question in this case that the libelant was an employee of Nacirema?

Mr. Cichanowicz: No.

The Court: There is no question in this case that Nacirema Stevedoring contractor was employed by someone to unload the vessel?

Mr. Cichanowicz: No, there is no question.

The Court: I do not see from a cursory examination of the document anything within it which would appear to be relevant, entirely apart from the basis of the pending objection, there is no undertaking, as I read it, on the part of Nacirema to handle cargo in any particular manner except to furnish slings and certain equipment, the major equipment to be used is expressly provided to be furnished by the (837) vessel, and although there are four characterizations of the party of the first part any one of which might be selected, *there is nothing within the four corners of the document to indicate that the Insular Navigation Company was acting either for the vessel or for the vessel's owner*, since I understand that the owner of the vessel is Joachim Hendrik Fisser, is that correct? (*Italics supplied.*)

Mr. Monigan: Corporation, yes.

The Court: I will sustain the objection to the offer. The offer may be marked for identification so that it may be referred to in any subsequent proceeding as the subject of this ruling.

(Contract marked Exhibit R-42 for identification.)

The Court: I might say that if counsel for the vessel can show by additional evidence, and cite controlling authority, the offer may be renewed. But as in the present posture of the proof, I can see no relevancy or competency in the proffered document, and hence my present ruling.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Interest of the United States	5
Summary of argument	6
Argument:	
A ship which is held liable in damages to an injured longshoreman is entitled to reimbursement from the stevedoring company whose breach of contractual duty to unload the ship safely and properly gave rise to the liability	8
A. The vessel is a third-party beneficiary of the stevedoring contract	8
B. Permitting the vessel directly to obtain reimbursement from the stevedoring company avoids circuitry of actions	12
Conclusion	14

CITATIONS

Cases:	
<i>Allen v. States Marine Corporation of Delaware</i> , 132 F. Supp. 146	11
<i>American Stevedores v. Porello</i> , 330 U. S. 446	9
<i>Atlantic Transport Co. v. Imbrovek</i> , 234 U. S. 52	9
<i>Barnstable, The</i> , 181 U. S. 464	13
<i>British Transport Commission v. United States</i> , 354 U. S. 129	14
<i>Cannella v. Lykes Bros. S. S. Co.</i> , 174 F. 2d 794	14

Cases—Continued

<i>Eastern Mass. Street Ry. Co. v. Transmarine Corp.</i> , 42 F. 2d 58, certiorari denied, 282 U. S. 883.....	Page 13
<i>Hagan v. Scottish Ins. Co.</i> , 186 U. S. 423.....	9
<i>Hartford Accident Co. v. Southern Pacific Co.</i> , 273 U. S. 207.....	14
<i>John Russell, The</i> , 68 F. 2d 901.....	9
<i>Moch Co. v. Rensselaer Water Co.</i> , 247 N. Y. 160.....	12
<i>Munich Assur. Co. v. Dodwell & Co.</i> , 128 Fed. 410, certiorari denied, 195 U. S. 629.....	9
<i>No. K 1, The</i> , 150 Fed. 111.....	13
<i>O'Rourke v. Peck</i> , 29 Fed. 223.....	10
<i>Reliance Marine Transp. & Const. Corp., Petition of</i> , 89 F. Supp. 272.....	10
<i>Ryan Stevedoring Co. v. Pan-Atlantic Corp.</i> , 350 U. S. 124.....	5, 6, 8, 13
<i>Seas Shipping Co. v. Sieracki</i> , 328 U. S. 85.....	6, 10-11
<i>States S. S. Co. v. Rothschild International Stevedoring Co.</i> , 205 F. 2d 253.....	11
<i>United States v. The Helen</i> , 164 F. 2d 111.....	13
<i>W. R. Grace & Co. v. Charleston Lighterage & Transfer Co.</i> , 193 F. 2d 539.....	14
<i>Weyerhaeuser S. S. Co. v. Nacirema Co.</i> , 355 U. S. 563.....	5, 8, 10, 13
Miscellaneous:	
<i>Benedict, Admiralty</i> (6th ed.), Vol. 1, p. 23.....	11
<i>Corbin, On Contracts</i> (1951 ed.), Vol. 4:	
Sections 772-855.....	10
Section 779G.....	12
Section 781.....	12
<i>Restatement of the Law of Contracts:</i>	
Sections 20-23.....	10
Sections 133-147.....	10
<i>Third Party Beneficiary Concept</i> , Note, 57 Col. L. Rev. 406.....	10
<i>Williston, Contracts</i> (rev. ed.), Vol. 2, Sections 347-403.....	10

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 62

**"JOACHIM HENDRIK FISSE", HER ENGINES, TACKLE,
APPAREL, ETC., PETITIONER**

v.

NACIREMA OPERATING CO., INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 14-39) is reported at 142 F. Supp. 389. The opinion of the United States Court of Appeals for the Third Circuit (R. 109-114) is reported at 249 F. 2d 818. The *per curiam* opinion of the Court of Appeals on the petition for rehearing (R. 129) and the dissenting opinion (R. 130) are reported at 249 F. 2d 821.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1957 (R. 114-115). A timely peti-

tion for rehearing was denied on December 5, 1957 (R. 131). The time within which to file a cross-petition for a writ of certiorari was extended to and including May 2, 1958, by order of Mr. Justice Brennan, dated March 1, 1958 (R. 132). The cross-petition for a writ of certiorari (No. 62) was filed on May 1, 1958, and granted on June 9, 1958 (R. 133; 357 U. S. 903). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a ship which has been chartered out to a third party, and has become liable *in rem* to a longshoreman as a result of his stevedoring employer's failure properly to perform its service agreement with the third party, may obtain reimbursement from the stevedoring company whose breach of contract gave rise to the liability.

STATEMENT

This proceeding *in rem* against the *S. S. Joachim Hendrik Fisser* was brought in admiralty by John H. Crumady, a longshoreman, to recover for personal injuries sustained when a boom fell upon him while the vessel was being unloaded at a berth in Port Newark, New Jersey (R. 7). The vessel at that time had been chartered out by its owners to Ovido Compania Naviera S. A. Panama (Ovido),¹ which company, through its agent, Insular Navigation Company (Insular), had entered into a stevedoring service agreement with

¹ The record does not disclose the nature of the chartering arrangement, i. e., whether it was a bare-boat, time, space or voyage charter. We believe that the result would be the same in any case.

Nacirema Operating Company (Nacirema), Crumady's employer, with respect to the "discharging and/or loading of vessels owned, operated or otherwise controlled by Insular * * * at the Port of Port Newark, New Jersey * * *" (R. 32, 96-97).² The ship impleaded Nacirema on the ground that the sole cause of libelant's injuries, and of the asserted liability of the ship to libelant, was Nacirema's improper performance of the unloading operation and, since Nacirema had contracted to perform these stevedoring duties in a skillful manner, it was required to reimburse and indemnify the ship for any damages found against the ship resulting from Nacirema's breach of this contractual duty (R. 14, 16):

The District Court found that Crumady's accident was caused solely by the negligent manner in which Nacirema's employees sought to extract certain long and heavy timber from the hold—more particularly, the improper positioning of the head of the boom by the stevedore's employees which resulted in a strain upon the lifting gear, its parting, and the consequent fall of the boom (R. 32). The District Court held that the stevedoring contractor's failure to exercise reasonable care in conducting the unloading operation "brought into play the unseaworthy condition of the vessel for which the latter would be liable in damages * * *" (R. 33).

The court further held that the ship was entitled to be reimbursed by Nacirema for the damages it was required to pay, since it was Nacirema's negli-

² Neither Ovido nor Insular was made a party to this litigation.

gence which constituted the "sole, active or primary cause" of the fall of the boom (R. 33). The court stated that, because Nacirema had entered into a stevedoring service agreement with the charterer of the vessel, through the charterer's agent, there was no direct contract between the owner of the vessel and Nacirema, upon which to ground the vessel's right to be reimbursed and indemnified.* Nevertheless, the court held that indemnification was warranted since "Entirely apart from its obligation under its contract with the agent for the charterer of the respondent vessel, Nacirema owed the vessel and her owners the duty of using due care in her unloading" (R. 33).

The Court of Appeals, ruling that there was no liability on the part of the ship to the injured longshoreman, reversed the judgment of the lower court. It agreed with the District Court that "the sole active or primary cause" of the accident was the improper positioning of the head of the boom by the stevedoring crew (R. 113). The Court of Appeals held, however, that this did not render the ship's gear unseaworthy; that "seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose", and that there was no proof, in this record, that the gear was unseaworthy (R. 113-114). The court's disposition of the case thus made it unnecessary to reach the issue of indemnification. A petition for rehearing was denied, Biggs, C. J., dissenting.

* The court did not discuss the ship's theory "that the shipowner was a third part[y] beneficiary of this contract" (R. 107).

INTEREST OF THE UNITED STATES

In *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, where the United States appeared as *amicus curiae*, this Court held that a shipowner, which had entered into a service agreement with a stevedoring company, was entitled to indemnification for all damages it sustained as a result of the stevedoring contractor's breach of its warranty of workmanlike service. This conclusion was reaffirmed by the Court in *Weyerhaeuser S. S. Co. v. Macirema Co.*, 355 U. S. 563, in which the United States also appeared as *amicus curiae*. As in *Ryan* and *Weyerhaeuser*, the United States, as the world's largest shipowner, is directly interested in the indemnification problem raised by the cross-petition in No. 62, *i. e.*, whether a ship which has been chartered out to a third party, and has become liable *in rem* to a longshoreman as a result of his stevedoring employer's failure properly to perform its service agreement with the third party, has a direct right to recover reimbursement from the stevedoring company whose breach of contract gave rise to the ship's liability. Since the United States frequently charts out its own vessels and also time-charters privately operated vessels to carry Government cargoes, and acts as a self-insurer in respect of many of these different types of operations, it has a special financial interest in the resolution of this legal problem.

SUMMARY OF ARGUMENT

In the event that this Court should reverse the judgment of the court below (in No. 61) and hold the ship liable for the injuries which the stevedore's negligence inflicted on the longshoreman—an issue upon which the Government takes no position in this brief—it is our view that the ship is entitled to be reimbursed by the stevedoring company for the judgment it will be required to pay. Although both courts below are in full agreement that the negligence of the stevedoring company was the “active or primary” cause of the accident, we think it is unnecessary for this Court to resuscitate such concepts, peculiar to the law of quasi-contractual or tort indemnity,⁴ in order to justify the stevedoring contractor's duty of reimbursement in this case. Rather, reimbursement may be predicated simply on the contractual theory that the vessel—which under *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, is charged with the nondelegable duty of properly conducting its loading and unloading operations—must be regarded as an intended beneficiary of any service contract, involving those operations, entered into between a charterer of the vessel and the stevedoring company.

It is wholly unrealistic to contend, as does the stevedoring company here, that its contractual duty to perform the unloading operation in a workmanlike manner was not owed to the vessel itself, which may be held responsible in damages for a violation of that

⁴ See *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, 132-133.

duty, but exclusively to the charterer of the vessel and its agent. In this connection, we point out that the third-party-beneficiary doctrine is no stranger to the maritime law, and that, in the circumstances of this case, an argument grounded upon strict notions of "privity of contract," while having the merit of simplicity, is calculated to permit an unjust and inequitable result, *i. e.*, the saddling of the ship with a loss brought about solely by the stevedoring company's improper performance of its contractual obligations skillfully to stevedore the ship. We point out additionally that to allow the vessel to obtain reimbursement directly from the stevedoring company will accomplish the desired result of avoiding circuitous actions. This follows from the fact that the charterer is liable to the owner of the vessel for the creation of a lien upon the vessel during the term of the charter (just as it would be liable to reimburse the owner for a personal liability caused during the term of the charter), and the charterer in turn can recover from the contracting stevedore whose breach of contract created the lien.

ARGUMENT

A SHIP WHICH IS HELD LIABLE IN DAMAGES TO AN INJURED LONGSHOREMAN IS ENTITLED TO REIMBURSEMENT FROM THE STEVEDORING COMPANY WHOSE BREACH OF CONTRACTUAL DUTY TO UNLOAD THE SHIP SAFELY AND PROPERLY GAVE RISE TO THE LIABILITY *

A. THE VESSEL IS A THIRD-PARTY BENEFICIARY OF THE STEVEDORING CONTRACT.

There is no question, as both courts below have found, that the sole cause of the longshoreman's injury was the improper manner in which the stevedoring contractor, Nacirema, conducted its unloading operation on board the vessel (R. 32, 33, 113). Nor can there be any question that the improper performance of the unloading operation constituted a breach of Nacirema's contractual undertaking "to faithfully furnish such stevedoring services as may be required * * *" (R. 97). *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U. S. 124; *Weyerhaeuser, S. S. Co. v. Nacirema Co.*, 355 U. S. 563. Moreover, Nacirema will not dispute that, under this Court's decisions in *Ryan* and *Weyerhaeuser*, it would be obligated at least to discharge the charterer of the vessel, Ovido, of all foreseeable damages resulting from Nacirema's breach of its contractual undertaking properly to stevedore the ship. Finally, the stevedoring contractor cannot contend that the damages which may be cast upon the vessel as a result of the stevedore's breach of contract are any less foreseeable, or differ

* Our argument in this brief is premised on the assumption that the Court reverses the judgment below in No. 61, *Crumady v. "Joachim Hendrik Fisser," etc., et al.* We take no position in this brief on the issues in No. 61.

in any respect, from those which may be cast upon the charterer of the vessel.

Nacirema argues, nevertheless, that it is not obligated to discharge the vessel directly of those same damages, resulting from its breach of its duty to stevedore the vessel skillfully, because its contract was not entered into expressly on behalf of the vessel, or her owners, but only on behalf of her charterer.* And, since the charterer of the vessel is not included as a party to this litigation, the argument continues, the stevedoring company is entitled to escape from the satisfaction of its contractual obligation.

But there is no real or substantial reason why the vessel should not be regarded as a third-party beneficiary of the stevedoring contract. The third-party beneficiary doctrine has been frequently applied in the maritime law,⁷ e. g., third-party beneficiaries of marine insurance policies—*Hagan v. Scottish Ins. Co.*, 186 U. S. 423; *The John Russell*, 68 F. 2d 901 (C. A. 2); *Munich Assur. Co. v. Dodwell & Co.*, 128 Fed. 410 (C. A. 9), certiorari denied, 195 U. S. 629; third-

* We think it is significant to note, at the outset, that Nacirema's attempt to disassociate the contractual responsibilities it owed to the charterers of the vessel from those owed to the vessel and its owners is somewhat undercut by the express admission of Nacirema, in its answer to Crumady's libel, "That at all times herein mentioned Joachim Hendrik Fisser and Hendrik Fisser or either of them operated said ship, 'Joachim Hendrik Fisser' through their agents, servants or employees." (Emphasis added.)

⁷ The stevedoring contract is a maritime contract. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 61-62; *American Stevedores v. Porello*, 330 U. S. 446, 456.

party beneficiary of covenant to repair dock—*O'Rourke v. Peck*, 29 Fed. 223 (S. D. N. Y.); third-party beneficiary of warranty of seaworthiness—*Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272, 277 (D. Conn.).^{*} And in this case, the circumstances surrounding the stevedoring contract between Nacirema and the charterer of the vessel clearly indicate that the vessel itself is to be regarded as an intended beneficiary of the stevedoring company's warranty of workmanlike service. It follows that the foreseeable expenses to the vessel, resulting from Nacirema's breach of its warranty of skillful performance, measures its liability. See Brief for the United States as Amicus Curiae in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, No. 75, Oct. T. 1957, pp. 16-19.

Modern contract law recognizes that "intention" refers to the necessary effect of the contract, and not to the subjective motives of the parties in making the contract. *Restatement of the Law of Contracts*, Sections 20-23; Note, *Third Party Beneficiary Concept*, 57 Col. L. Rev. 406, 409 (1957). In the instant case, by contracting with the vessel's charterer to conduct the vessel's unloading operation in a safe and proper manner, the stevedoring company nevertheless was still performing, on behalf of the vessel, a duty—nondelegable in nature—for whose breach the vessel remained responsible. *Seas Shipping Co. v. Sieracki*,

^{*} For general discussion of third-party beneficiaries, see Corbin, *On Contracts* (1951 Ed.), Vol. 4, Sections 772-853; Williston, *Contracts* (Rev. Ed.), Vol. 2, Sections 347-403; *Restatement of the Law of Contracts*, Sections 133-147.

328 U. S. 85. The necessary effect of a breach of the stevedore's contractual undertaking, therefore, was to subject the vessel to liability. In other words, it was clearly within the contemplation of the parties at the time the contract was entered into that, if the stevedoring company made the vessel unseaworthy and thereby caused injury to a stevedore employee, the vessel would be cast in damages for the full amount of this injury. *Ibid*; *States S. S. Co. v. Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9).^{*} In these circumstances, it seems clear that the vessel must be regarded as an intended beneficiary of the stevedoring company's contractual obligation. In this area of the law, arguments based upon strict privity of contract are wholly unrealistic.¹⁰

By allowing the vessel itself to recover as a beneficiary of the stevedoring contract for its unloading,

^{*} In that case, the stevedoring company had also been hired by a charterer, and not by the ship. The court nevertheless held that the stevedore owed the ship a duty to refrain from negligent practices which would subject the ship to liability to third parties. We think the court's result could just as easily have been grounded upon the third-party beneficiary doctrine. See, also, *Allen v. States Marine Corporation of Delaware*, 132 F. Supp. 146 (S. D. N. Y.), which was relied upon by the District Court here in awarding indemnification (R. 34-35).

¹⁰ Indeed, it could be forcefully argued that, even if privity of contract were necessary, it was supplied by the relationship of the parties with respect to the non-delegable duty being performed by the stevedoring company. Cf. *Benedict, Admiralty* (6th Ed.), Vol. 1, p. 23. It would appear, for example, that the stevedoring contractor could establish a lien upon the vessel if the charterer failed to perform its part of the contract. *Ibid*.

the third-party beneficiary concept is kept within well-defined boundaries. The vessel is obviously identifiable at the time performance under the contract is due; it certainly cannot be regarded as a member of an indeterminate or general class. Cf. *Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160; see Corbin, *On Contracts*, Vol. 4, Section 781. The vessel's interest in the proper performance of the stevedoring contract for its own unloading is no greater than that of the charterer of the vessel. And the risk of defective performance which is assumed by the stevedore contractor is not increased by allowing the vessel to recover under the contract. See *supra*, pp. 8-9. All of these factors demonstrate, we believe, the propriety of permitting the vessel to recover directly as a third-party beneficiary." There is, moreover, an additional and compelling reason for allowing reimbursement in this case.

B. PERMITTING THE VESSEL DIRECTLY TO OBTAIN REIMBURSEMENT FROM THE STEVEDORING COMPANY AVOIDS CIRCUITY OF ACTIONS.

By proceeding *in rem* against the vessel, the libellant seeks to subject the vessel to a maritime lien for having breached a duty owed to him. It is undisputed,

"See Corbin, *On Contracts*, Vol. 4, Section 779G: "As the beneficiaries who assert rights under a contract become more remote from the contracting parties, as their number increases and their identity becomes less certain, and as the interests asserted by them become more complex, the greater is the probability that the courts will not sustain suits in their behalf."

In this case, as we have shown above, it cannot be seriously argued that (1) the vessel is a remote beneficiary; (2) its identity is uncertain; or (3) its asserted interest is more complex than that of its charterer.

however, that at the time of the injury the vessel had been chartered out to Ovido which was bound to return the vessel to its owners free from any maritime lien arising from its use of the vessel during the term of the charter. *The Barnstable*, 181 U. S. 464; *Eastern Mass. Street Ry. Co. v. Transmarine Corp.*, 42 F. 2d 58 (C. A. 1), certiorari denied, 282 U. S. 883; *United States v. The Helen*, 164 F. 2d 111 (C. A. 2); *The No. K 1*, 150 Fed. 111 (C. A. 2). As Mr. Justice Brown stated in *The Barnstable*, *supra*, at 468-469:

This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received, less the ordinary results of wear and tear, and such injuries as are caused by a peril of the sea, or inevitable accident.

Accordingly, the owners of the vessel—who appear in this *in rem* proceeding only as claimants of the vessel—would be entitled to hold Ovido responsible for the lien created on the vessel as a result of its use during the charter term. There can also be no doubt that Ovido would be entitled, in turn, to throw its loss back on the stevedore, whose breach of contract created the maritime lien. *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U. S. 124; *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563; see *United States v. The Helen*, 164 F. 2d 111, 112 (C. A. 2d). Hence, by allowing the vessel directly to obtain reimbursement from the stevedoring company in this proceeding, the much desired result—especially in admiralty—of avoiding circuitous actions is accom-

plished. See *W. R. Grace & Co. v. Charleston Lighterage & Transfer Co.*, 193 F. 2d 539, 544 (C. A. 4); *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794, 796 (C. A. 2); cf. *British Transport Commission v. United States*, 354 U. S. 129; *Hartford Accident Co. v. Southern Pacific Co.*, 273 U. S. 207.

CONCLUSION

In the event that this Court should reverse the judgment of the Court of Appeals in No. 61, it is respectfully submitted that the judgment of the District Court awarding indemnification to the vessel should be reinstated.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
Attorneys.

OCTOBER 1958.